

(21,231.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 435.

THE LOUISVILLE AND NASHVILLE RAILROAD
COMPANY, PLAINTIFF IN ERROR,

vs.

SPENCER MELTON.

IN ERROR TO THE COURT OF APPEALS OF THE STATE
OF KENTUCKY.

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1 COMMONWEALTH OF KENTUCKY:

The Court of Appeals.

Pleas before the Honorable the Court of Appeals of Kentucky, at the Capitol, at Frankfort, on the Nineteenth Day of November, 1907.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,

vs.

SPENCER MELTON, Appellee.

Appeal from Hopkins Circuit Court.

Be it remembered that on the 14th day of March, 1907, the appellant by its attorney filed in the office of the clerk of the Court of Appeals a transcript of the record, and which is in words and figures as follows, to-wit:

2 STATE OF KENTUCKY, *County of Hopkins:*

In the Hopkins Circuit Court, Special October Term, 1906.

Pleas begun and held at the Court House, in the City of Madisonville, County and State aforesaid, on Monday, October 22nd, 1906, when — present Hon. J. F. Gordon, Judge of said court and D. W. Gatlin, Clerk, at which special term of said Court so begun and held the following proceedings among others were held:

Be it remembered that theretofore, to-wit: August 15th, 1905, the plaintiff, Spencer Melton, instituted in said Court an action against the Louisville & Nashville Railroad Company by producing and filing in the office of the Clerk of said Court a certain petition ordinary against said Louisville & Nashville Railroad Company, upon which petition so filed said Clerk thereupon issued summons as required by law, which was thereafter duly executed on said defendant as appears from the endorsement made thereon by the sheriff of said County.

Said petition so filed is in words and figures as follows, to-wit:

Hopkins Circuit Court.

SPENCER MELTON, Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

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Hopkins Circuit Court.

SPENCER MELTON, Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Petition.

The plaintiff, Spencer Melton, states that he is now and was at the time that the acts hereinafter complained — were committed a resident of Hopkins County Kentucky.

That the defendant, the Louisville & Nashville Railroad Company was then and is now, a corporation, created, organized and doing business under the laws of the State of Kentucky, and engaged in the operation of a line of railroad from Evansville, Indiana, through Hopkins County Kentucky, and beyond, and that it has in said Hopkins County, an agent upon whom process may be served.

Now plaintiff states that on the 21st day of March, 1905, within one year next before the institution of this action, and while in the employ of the defendant, and while acting in the presence of, and under the orders and directions of his superior in authority, to-wit: the foreman of the construction crew with which he was working, a heavy bent weighing some two thousand pounds, and composed of several heavy timber- placed together, fell upon and injured this plaintiff.

That said bent or timbers fell through the gross negligence and car-lessness of the defendant, its agents and servants, in that
4 said defendant through its foreman negligently and car-lessly ordered and directed and suffered and permitted the crew engaged in lifting said heavy timbers with which this plaintiff was working to use in said work improper, unsafe, dangerous and defective appliances and tools, which facts were known to the said defendant, its said agent or servant, or should have been so known to one in his position and could have been discovered by the exercise of ordinary care on his part, and all of which was unknown to this plaintiff, nor did he have an equal opportunity or any opportunity to ascertain such facts and he could not have known thereof by the exercise of ordinary care.

Plaintiff states that the injuries received by him consisted of bruises and sprains, of various kinds and in various places, that his spinal cord was bruised and scarred, and from the injuries so received he has suffered great mental and physical pain and anguish; has incurred medical and physicians' bills in having said injuries treated; has suffered great loss of time from his business; and since receiving said injuries he has been and is now confined to his bed; that his lower limbs are paralysed; that said injuries are permanent and of such nature that his earning capacity now and forever afterwards, has been totally and forever destroyed and he will never be able to perform work or labor of any kind by all of which he has been damaged in the sum of Twenty Five Thousand (\$25000.00) dollars.

Plaintiff states that the wrongs herein complained of were committed in Vanderberg County Indiana.

5 Wherefore plaintiff prays judgment against the defendant for the sum of Twenty Five Thousand (\$25000.00) Dollars, he prays for his costs herein and for all proper relief.

CLAY & CLAY,
Attorneys for Plaintiff.

On September 4th, 1905, the same being rule day in the office of the Clerk of said Court, the following order was made and entered of record as follows:

Hopkins Circuit Court.

September Rule Day, September 4th, 1905.

SPENCER MELTON, Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Order.

The defendant came and filed written motion to require plaintiff to make his petition more specific.

Defendant's said written motion so filed herein is as follows, to-wit:

Hopkins Circuit Court.

SPENCER MELTON, Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Motion to Make Petition More Specific.

Defendant moves the Court to require plaintiff to make his petition more specific so as to indicate what appliances and tools were unsafe and wherein they were defective.

C. J. WADDILL,
Attorney for Defendant.

6 The next order made in said action was entered of record as follows:

Hopkins Circuit Court.

September Term, 1st Day, September 25th, 1905.

SPENCER MELTON, Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Order.

Came defendant by attorney and moved the Court on written motion filed herein on September 4th, 1905, to require plaintiff to make his petition more specific so as to indicate what appliances and tools were unsafe and wherein they were defective, which motion being submitted to and considered by the Court is now overruled, to which defendant excepts. Defendant then filed its general demurrer to the petition, which being submitted to and considered by the court is now overruled, to which defendant excepts. Defendant then by leave of the Court filed its answer herein.

Defendant's general demurrer filed herein is as follows:

Hopkins Circuit Court.

SPENCER MELTON, Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

General Demurrer to Petition.

Defendant demurs to the petition because it does not state facts sufficient to constitute a cause of action.

C. J. WADDILL,
Attorney for Defendant.

7 Defendant's said answer filed herein September 25th, 1905, is as follows, to-wit:

Hopkins Circuit Court.

SPENCER MELTON, Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Answer.

Defendant for answer denies that the bent weighed two thousand pounds or exceeding — pounds. It admits that the bent or timbers fell upon and injured plaintiff, but denies that same fell through the negligence or carelessness of defendant or any of its agents or servants. It denies that it or its foreman negligently or carelessly ordered or directed or suffered or permitted the crew to use in said work improper, unsafe, dangerous or defective appliances or tools; or that same was known to defendant or its said agent or servant or should have been known to one in his position or could have been discovered by the exercise of ordinary care. Defendant denies that the said appliances and tools or any of the same were improper or unsafe or dangerous or defective; it denies that such condition was known to it or said agent or servant or should have been known to one in his position or could have been discovered by the exercise of ordinary care on his part. It denies that its foreman negligently or carelessly ordered or directed or suffered or permitted the crew to use such appliances or any of same. Except as hereinafter expressly admitted defendant denies that the injuries received by him consist of bruises or sprains of various kinds or in various places; it denies that his spinal column was bruised or scarred or that he has suffered great mental or physical pain or anguish; it denies that he has incurred medical or physicians' bills in having said injuries treated or has suffered loss of time from his business or has been or is now confined to his bed; it denies that his lower limbs are paralysed; it denies that his injuries are permanent or that

his earning capacity has been destroyed; it denies that he will never be able to perform work or labor; it denies that he has been damaged in the sum of \$25000.00 or any sum. Defendant admits that the fall of the bent upon plaintiff caused considerable injury, the full nature or extent of which it is unable to determine. It alleges that such injuries are not permanent and will not incapacitate him from performing work or earning his support. Par. 2. Defendant says that plaintiff by his own negligence caused and contributed to the injury complained of and but for same he would not have been injured.

Par. 3. Defendant says that plaintiff had equal means with the defendant of knowing the condition of the appliances and tools and did in fact know the exact condition thereof in so far as same was open to ordinary inspection or could have been ascertained by ordinary care by either master or servant; that he knew of such condition at the time of his injury and for such a length of time prior thereto as to have protected himself from injury by ordinary care on his part; that he voluntarily continued his labors with full knowledge of all such conditions and voluntarily assumed the risks incident thereto.

Wherefore defendant prays to be hence dismissed with its costs and for all proper relief.

C. J. WADDILL,
Attorney for Defendant.

9 At the following February Term of said Court the next order was made in said action as entered of record as follows, to-wit:

Hopkins Circuit Court.

February Term, 1st Day, February 5th, 1906.

SPENCER MELTON, Plaintiff,

vs.

L. & N. R. R. Co., Defendant.

Order.

Plaintiff's reply heretofore lodged is now filed and noted of record.

Said reply so filed herein is as follows, to-wit:

Hopkins Circuit Court.

SPENCER MELTON, Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Reply.

The plaintiff for reply to the answer of defendant denies that his injuries are not permanent, or will not incapacitate him from per-

forming work or earning his support; he denies that by his own negligence he caused or contributed to the injury complained of or but for same he would not have been injured; he denies that he had equal means with the defendant, or any means, of knowing the condition of the appliances or tools, or that he did in fact know the exact condition thereof in so far as the same was open to ordinary inspection or that he could have ascertained same by ordinary care

10 on his part; he denies he knew of such condition at the time of his injury, or for such length of time prior thereto as to have protected himself from injury by ordinary care on his part; he denies he voluntarily continued his labors with full knowledge of all or any of such conditions, or voluntarily assumed the risks incident thereto.

Wherefore plaintiff prays as in his petition.

CLAY AND CLAY,
Attorneys for Plaintiff.

Thereafter this order was made and entered of record, viz:

Hopkins Circuit Court.

February Term, 1st Day, February 5th, 1906.

The parties to the hereinafter named actions having been heretofore awarded a Jury for the trial of said actions the same are now set down for trial at this term on the days herein assigned as follows:

Twenty-third Day.

SPENCER MELTON

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY.

On the 22nd day of said Feb'y Term the next order was made and entered of record herein as follows, to-wit:

Hopkins Circuit Court.

February Term, 22nd Day, March 1st, 1906.

SPENCER MELTON, Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Order.

11 Came the plaintiff by attorney and moved the Court to allow him to file an amended petition herein, to which defendant objected, but the Court having considered the objection overruled the same and permitted said amended petition to be filed, to which defendant excepted.

Said amended petition so filed herein is as follows, to-wit:

Hopkins Circuit Court.

SPENCER MELTON, Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Amended Petition.

The plaintiff, Spencer Melton, by leave of Court amends his original petition herein and states: That the Legislature of the State of Indiana, at its regular session in 1893 passed and adopted an act generally known as the "Fellow Servant" act, which became a law March 4th, 1893, and which act may be found in the legislative acts of the State of Indiana for 1893, at chapter 130, page 294; that at its regular session of 1895, by an act which became a law March 7th, 1895, acts 1895, chapter 64, page 148, the said legislature repealed the section of said act; said act forms and constitutes a part of the statute law of the State of Indiana, and is embraced in sections 7083 to 7087 of Burns' Revised Statutes of Indiana, revision of 1901. So much of said act as applies to plaintiff's cause of action herein is quoted below. The regular figures refer to the section of the aforesaid Indiana Statutes, and the figures in parenthesis refer to the number of the section of the original act; 7083 (1) that every railroad or other corporation, except municipal, operating in this State, shall be liable for damages for personal injury suffered by any employé while in its service, the employé so injured being in the exercise of due care and diligence, in the following cases:

First. When such injury is suffered by reason of any defect in the condition of ways, works, plant, tools and machinery connected with or in use in the business of such corporation, when such defect was the result of negligence on the part of the corporation, or some person intrusted by it with a duty of keeping such way, works, plant, tools or machinery in proper condition.

Second. Where such injury resulted from the negligence of any person in the service of such corporation, to whose order or direction the injured employé at the time of the injury was bound to conform, and did conform.

Third. Where such injury resulted from the act or omission of any person done or made in obedience to any rule, regulation or by-law of such corporation, or in obedience to the particular instructions given by any person delegated with the authority of the corporation in that behalf.

13 Fourth. Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any signal, telegraph office, switch yard, shop, round house, locomotive engine, or train upon a railway, or where such injury was caused by the negligence of any person, co-employé, or fellow servant, at the time acting in the place, and performing the

duty of the corporation in that behalf, and the person so injured, obeying or conforming to the order of some superior at the time of such injury, having authority to direct; but nothing herein shall be construed to abridge the liability of the corporation under existing laws.

7085 (3) The measure of damages recoverable under this act, shall be commensurate with the injury sustained unless death results from such injury, when, in such case, the action shall survive and be governed in all respects by the law now in force in such actions; provided, that where any such person recovers a judgment against a railroad or other corporation, and such corporation takes an appeal, and, pending such appeal, the injured person dies, and the judgment rendered in the Court below be thereafter reversed, the right of action of such person shall survive to his legal representative.

7087 (5) All contracts made by railroads or other corporations with their employes, or rules or regulations adopted by any corporation releasing or relieving it from liability to any employé having a right of action under the provisions of this act are hereby declared null and void. The provisions of this act however shall not apply

14 to any injuries sustained before it takes effect, nor shall it affect in any manner any suit or legal proceedings pending at the time it takes effect.

The plaintiff states that so much of the act of the Legislature of the State of Indiana, as is quoted above, was in full force and effect at the time he was injured, as set forth in his petition, is now in full force and effect, and has been in full force and effect since it became a law March 4th, 1893.

Now plaintiff states that the foreman of the construction crew with which he was working as set forth in his petition, was intrusted with the duty of keeping the tools and appliances in the proper condition: that said foreman was delegated with the authority of the corporation in doing the work at which plaintiff and the other members of said crew were engaged; that he had authority to direct said work; and plaintiff was bound to and did conform to the said foreman's orders and directions — was so conforming thereto at the time he was injured. He further states that at the time he was injured he was exercising due care and diligence.

Plaintiff further states that from the injuries received by him as set forth in his original petition, he will at all times hereafter suffer great mental and physical pain and anguish, and has so suffered since the filing of his said petition; that since the filing of said petition he has been compelled to expend more money in having his injuries treated, and will have to expend further large sums of money in so doing and he has and will hereafter lose time from his business.

Wherefore plaintiff prays as in his original petition.

CLAY AND CLAY,
Attorneys for the Plaintiff.

15

On the 24th day of said Feby. Term, the next order was made and entered of record as follows:

Hopkins Circuit Court.

February Term, 24th Day, March 3rd, 1906.

SPENCER MELTON, Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Order.

Came the defendant and moved the Court to require the plaintiff to elect whether he will proceed herein under the Indiana Statute pleaded, or under the Common Law, to which plaintiff objected, and said motion is for the time continued.

On the first day of the following May Term the next order was made and entered of record herein as follows:

Hopkins Circuit Court.

May Term, 1st Day, May 7th, 1906.

SPENCER MELTON, Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Order.

16 The Court having duly considered defendants motion to require plaintiff to elect, which motion was this day filed, and is to require plaintiff to elect whether he will prosecute this action under the Common Law or under the laws of the State of Indiana, said motion is sustained and the plaintiff required to make said election, to which ruling of the Court the plaintiff objected and excepted, and the plaintiff was granted time until and including the 4th day of this term to determine the matter of his election herein.

The next order in said action was made and entered of record as follows:

Hopkins Circuit Court.

May Term, 1st Day, May 7th, 1906.

The parties to the hereinafter named actions having heretofore been awarded a jury for the trial of said causes, were set down for trial at this term on the days hereinafter assigned for the calling of said causes as follows,—

Twenty-First Day.

SPENCER MELTON,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY.

On the 3rd day of said May Term, 1906, this order was made and entered of record, to-wit:

Hopkins Circuit Court.

May Term, 3rd Day, May 9th, 1906.

SPENCER MELTON, Plaintiff,

vs.

17 LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Order.

This day came plaintiff in compliance with the order of the Court herein and filed his responses to defendant's motion to require him to elect whether he will proceed herein under the Indiana Statutes, or under the Common Law, electing to proceed under the Indiana Statutes.

The defendant came and filed a general demurrer to plaintiff's petition as amended. Ordered that said demurrer be submitted to the Court, and the Court having considered same overruled said demurrer to which defendant excepted.

Plaintiff's said election so filed herein as follows, to-wit:

Hopkins Circuit Court.

SPENCER MELTON, Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Election.

Complying with the order of the Court to elect whether he will proceed herein under the Indiana Statute pleaded or under the "Common Law," and still excepting to the order of the Court requiring him to so elect, the plaintiff, Spencer Melton, elects to proceed under the Indiana Statute pleaded.

CLAY & CLAY,
Attorneys for Plaintiff.

18

Defendant's demurrer to the petition as amended filed herein is as follows, to-wit:

Hopkins Circuit Court.

SPENCER MELTON, Plaintiff,
vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

General Demurrer to Petition as Amended.

Defendant demurs to plaintiff's petition as amended because it does not state facts sufficient to constitute or support a cause of action.

WADDILL & DEMPSY,
Attorneys for Defendant.

On the 6th day of said May Term the next order was made and entered of record in said action as follows:

Hopkins Circuit Court.

May Term, 6th Day, May 12th, 1906.

SPENCER MELTON, Plaintiff,
vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Order.

This day came defendant by attorney and by leave of the Court filed its answer to the amended petition herein.

19 Defendant's said answer to the amended petition so filed herein is as follows:

"Hopkins Circuit Court.

SPENCER MELTON, Plaintiff,
vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Answer to Amended Petition.

Defendant for answer to the amended petition herein denies that any part of the Statute pleaded in said petition applies to plaintiff's cause of action; it denies that the foreman of the construction crew was entrusted with the duty of keeping the tools or appliances in proper condition, or was delegated with the authority of the corporation in doing the work or had authority to direct said work; it denies that plaintiff was bound to or did conform to said foreman's orders or directions, or was conforming thereto at the time he was injured; it denies that plaintiff at the time he was injured was exercising due care or diligence, it denies that plaintiff has suffered or will suffer

great mental or physical pain or anguish or has been compelled to expend or will have to expend money in having his injury treated or that he has lost or will hereafter lose time from his business.

Par. 2. Defendant for further answer to the amended petition says that the title to the Indiana Act pleaded in the amended petition was and is as follows: "An act Regulating liability of railroad and other corporations, except municipal, for personal injury to persons employed by them, fixing the rules of evidence which shall govern in such cases, and providing that the decisions or statutes of other States shall not be pleaded or proven as a defense in this State; provided, further that its provisions shall not apply to any injury sustained before it takes effect, nor in any manner any suits or legal proceedings pending at the time it takes effect and declaring an emergency."

And defendant further says that the following section was originally and ever since has been, a part of the act pleaded in the amended petition which forms and constitutes a part of the statute law of the State of Indiana, to-wit: "Laws of other States not a defense.

4. In case any railroad corporation which owns or operates a line extending into or through the State of Indiana and into or through another or other states, and a person in the employ of such corporation, a citizen of this State, shall be injured as provided in this act, in any other state where such railroad is owned or operated, and a suit for such injury shall be brought in any of the Courts of this State, it shall not be competent for such corporation to plead or prove the decisions or statutes of the state where such person shall have been injured as a defense to the action brought in this State."

Defendant says that the Indiana statute pleaded does not have and was not intended to have any extra territorial effect and that it is operative in said state alone and not in Kentucky. Defendant says that no principle of comity requires or admits of the enforcement of the Indiana statute pleaded in the amended petition in any forum, and that the State of Indiana intended that said statute should not be enforceable in the Courts of Kentucky.

Wherefore defendant prays to be hence dismissed, for its costs and all proper relief.

WADDILL & DEMPSEY,
Attorneys for Defendant.

21 On the 10th day of said May Term the next order was made and entered of record herein. Said order is as follows:

Hopkins Circuit Court.

May Term, 10th Day, 17th Day of May, 1906.

SPENCER MELTON, Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Order.

Came plaintiff and filed his general demurrer to answer to amended petition, and without waiving same filed reply to such answer.

Then defendant filed its general demurrer to said reply and without waiving such demurrer filed its rejoinder to said reply.

Plaintiff's said demurrer to answer to amended petition and reply to such answer so filed herein is as follows, to-wit:

Hopkins Circuit Court.

SPENCER MELTON, Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Demurrer and Reply to Answer to Amended Petition.

22 The plaintiff demurs to the second paragraph of the defendant's answer to his amended petition herein because it does not state facts sufficient to constitute a defense to plaintiff's cause of action.

Without waiving his said demurrer, the plaintiff for reply thereto, denies that the section of the Indiana Statute quoted has been since its enactment, a part of the act pleaded by the plaintiff. It is true said statute was not intended to have any extra territorial effect, and that it is operative in said state alone and not in Kentucky, but plaintiff was injured in Indiana as stated and his cause of action arose in Indiana where said statute is operative, and his rights are controlled and governed by the laws of that State.

Plaintiff denies that no principal of comity requires or admits of the enforcement of the Indiana Statute pleaded in the amended petition, in any Kentucky forum, and denies that the state of Indiana intended that said Statute should not be enforceable in the courts of Kentucky.

For further reply the plaintiff states that the section of the Indiana Statute quoted in defendant's answer to his amended petition, being section 4 of the original act was, by the Supreme Court of Indiana, (which Court was and is the Court of last resort in that State) on the 17th day of January 1902, and in the case of Baltimore and Ohio Southwestern Railway Company *vs.* Reed, reported in 158 Indiana Reports, page 25, and in 62 North Eastern Reporter page 488, de-

clared to be an unconstitutional confiscation of property rights an invalid exercise of legislative power, and therefore null, void and of no effect, at which time said 4th section of said act ceased to be a part thereof, and has continued to be and is now no part of said act.

Said decision of said Court has never been overruled, 23 modified, set aside, or changed, and is now in full force and effect.

Plaintiff's cause of action accrued since said 17th day of January, 1902, and since said fourth section of said act was held to be void and of no effect.

Wherefore plaintiff prays as in his original and amended petition.

CLAY & CLAY,
Attorneys for Plaintiff.

Defendant's said demurrer and rejoinder to the reply so filed herein is as follows, to-wit:

Hopkins Circuit Court.

SPENCER MELTON, Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Demurrer and Rejoinder to Reply.

Defendant demurs to the reply because it does not state facts sufficient to support a cause of action.

Without waiving its said demurrer defendant for rejoinder denies that said section 4. of the original Indiana act was declared to be an unconstitutional confiscation of property rights or an invalid exercise of legislative power or null, void or of no effect, or that said section ceased to be a part of said act or is not now a part.

Defendant admits that the Supreme Court of Indiana in the case cited held that so far as said section 4 undertook to affect vested rights it was an invalid exercise of legislative power. 24 Defendant said the validity of such section is immaterial, as whether valid or invalid, it reveals the intent and purpose of the act and shows that the Indiana Legislature did not intend that any part of the act should be enforceable outside of the State of Indiana.

WADDILL & DEMPSEY,
Attorneys for the Defendant.

At the following September Term 1906, of said Court, the next order was made and entered of record as follows, to-wit:

Hopkins Circuit Court.

September Term, 1st Day, September 24th, 1906.

The parties to the hereinafter named actions having been awarded a jury for the trial of said causes the same are now set down for trial on the days hereinafter assigned for the calling of said causes, to-wit:

Sixteenth Day.

SPENCER MELTON

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY.

On the 16th day of said term the next order in said action was entered as follows:

Hopkins Circuit Court.

September Term, 16th Day, October 11th, 1906.

SPENCER MELTON, Plaintiff,

vs.

25 LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Order.

Came defendant by attorney and offered to file an amended answer herein, to the filing of which plaintiff objected, but the Court overruled said objection and permitted same to be filed, to which plaintiff excepted.

Defendant's said amended answer filed herein is as follows, to-wit:

Hopkins Circuit Court.

SPENCER MELTON, Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Amended Answer.

Defendant for further amendment to its answer says that except as constitutionally modified by the statutes pleaded in the amended petition the law of the State of Indiana is and has always been that all employes of a common master are fellow servants for whose negligence the master is not responsible unless the negligent employe is a vice principal who in the particular act represents the master in performing a non-delegable duty; that the Supreme Court of that State correctly declares the law of that State to be that the foreman of a construction crew is a fellow servant with one of the crew under him

26 and that the Master is not liable for the negligence of such foreman unless he is vice principal representing the master in the negligent act as to some duty which the master cannot delegate, and said Court in declaring said law also used this language which correctly defines the rule in Indiana, viz: "The controlling consideration in determining whether an employe is a vice principal is, not his comparative rank, not his authority to command, and not his authority to employ and discharge, but whether he is the repre-

sentative of the master in respect to those duties which the Master cannot escape by a delegation of them".

Defendant says that the said Indiana Statute pleaded cannot and does not apply to the facts of this case and plaintiff cannot rely thereon, and that under the law of Indiana as to the character of work then in hand the plaintiff was a fellow servant with the said foreman of the construction crew for whose negligence the defendant is not liable.

Wherefore the defendant prays to be hence dismissed, and for all relief.

WADDILL & DEMPSEY,
Attorneys for Defendant.

On October 17th, 1906, the same being the 21st day of the regular September 1906, term of said Court, said Court by its order then made and entered of record called a special term of said Court for the trial of the causes named in said order. Said order is as follows, viz:

Hopkins Circuit Court.

September Term, 21st Day, October 17th, 1906.

27 A Special Term of the Hopkins Circuit Court is hereby called to be holden by the regular Judge of this Court at the Court House in Madisonville, Kentucky, beginning Monday October 22nd, 1906, and continuing to and including 22nd day of December, 1906, at which special term a petit jury will be impaneled for the trial of civil causes. At said special term only the following causes shall be docketed and only in these causes shall any motion, order or judgment be entered. * * *

Those pending on the Common Law Docket are as follows:

SPENCER MELTON

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY.

The next order entered of record in said action follows:

Hopkins Circuit Court.

Special October Term, 1st Day, October 22nd, 1906.

On a call of the Common Law Docket the following causes were set down for trial on the days hereinafter assigned for the calling of said causes.

Tenth Day.

SPENCER MELTON

vs.

L. & N. R. R. Co.

28 On said 10th day of said Special Term the next order was made and entered of record as follows:

Hopkins Circuit Court.

Special October Term, 10th Day, November 1st, 1906.

SPENCER MELTON, Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Order.

Came the plaintiff and by leave of the Court filed his reply to defendant's amended answer herein.

Plaintiff's said reply to defendant's amended answer filed herein is as follows, to-wit:

Hopkins Circuit Court.

SPENCER MELTON, Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Reply to Amended Answer.

The plaintiff for reply to the amended answer of the defendant herein denies that except as constitutionally modified by the statute pleaded in the amended petition the law of the State of Indiana is, or always has been, that all employes of a common master are fellow servants for whose negligence the master is not responsible unless the negligent employe is a vice principal who in the particular act represents the master in performing a non-delegable duty;

29 he denies that the Supreme Court of that State correctly or at all declared the law of that state to be that the foreman of a construction crew is a fellow servant with one of the crew under him, or that the master is not liable for the negligence of such foreman unless he is vice principal representing the Master in the negligent act as to some duty which the master can not delegate, or that the decision of the said Supreme Court as set forth or quoted from so holds or declares the law of that state to be.

He denies the Indiana Statute pleaded cannot or does not apply to the facts of this case, or that plaintiff can not rely thereon, or that under the law of Indiana as to the character of work then in hand

the plaintiff was a fellow servant with said foreman of the construction crew for whose negligence the defendant is not liable.

Wherefore the plaintiff prays as in his petition and amended petition.

CLAY & CLAY, AND
GORDON, GORDON & COX,
Attorneys for Plaintiff.

The next order in said action is as follows:

Hopkins Circuit Court.

Special October Term, 10th Day, November 1st, 1906.

SPENCER MELTON, Plaintiff,
vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Order.

30 Came defendant by attorney and tendered and offered to file its additional amendment to answer.

The next order in said action now follows:

Special October Term, 11th Day, November 2nd, 1906.

SPENCER MELTON, Plaintiff,
vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Order.

Came the plaintiff by attorneys and by leave of the Court filed his second amended petition herein, to which defendant excepted.

Plaintiff's said 2nd amended petition filed herein over objection of defendant is as follows, to-wit:

Hopkins Circuit Court.

SPENCER MELTON, Plaintiff,
vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

2nd Amendment to Petition.

The plaintiff by leave of the Court amends his petition, amendment to the petition and petition as amended, and states that the injury received by him complained of in the petition resulted from the negligence of the foreman, in the service of
31 defendant corporation, to whose orders and directions the

plaintiff at the time of the injury was bound to conform and did conform, and that said negligence consisted not only of the acts alleged in the petition and amendment to the petition, but in negligently failing to furnish plaintiff a reasonably safe place in which to work in negligently giving to him improper orders and in negligently adopting and using improper and unsafe means to perform the work in hand, all of which negligence on his part was gross and in connection and concurring with the negligence heretofore specifically alleged in the petition and amendment, directly caused the injury complained of; that plaintiff did not know and by the use of ordinary care could not have discovered the unsafety of the place, orders and means of work, but that defendant did know or by the exercise of ordinary care on its part would have known thereof.

Wherefore plaintiff prays as formerly.

CLAY & CLAY,
GORDON, GORDON & COX,
Attorneys for Plaintiff.

The next order of record in said action follows:

Hopkins Circuit Court.

Special October Term, 11th Day, 2nd Day of November, 1906.

SPENCER MELTON, Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Order.

32 The Court overruled plaintiff's objection to the filing of defendant's additional amendment to its answer and permitted same to be filed, to which plaintiff excepted.

Plaintiff then filed his demurrer and reply to said additional amended answer. The Court overruled said demurrer, to which plaintiff excepted. The defendant then filed its general demurrer to the 2nd amended petition of plaintiff filed heretofore on this day, and to the petition as amended, which demurrer the Court overruled to which defendant excepted. Defendant then moved the Court to require plaintiff to paragraph his causes of action, to which plaintiff objected and the Court overruled said motion, to which defendant excepted.

Defendant then moved the Court to require plaintiff to state more specifically the facts constituting the negligence of which he complains, to which plaintiff objected and the Court overruled said motion to which defendant excepted.

The defendant then filed its answer to the plaintiff's second amended petition. Then by agreement of parties all pleadings heretofore filed by either party are made to apply to the petition as now amended.

The defendant then moved the Court for a judgment for it on the face of the pleadings, to which plaintiff objected, which motion the Court overruled, to which defendant excepted.

Defendant's additional amendment to its answer filed herein is as follows, to-wit:

33

Hopkins Circuit Court.

SPENCER MELTON, Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Additional Amendment to Answer.

Defendant says that the Indiana Statute pleaded in the amended petition herein can not constitutionally apply to the facts of this case; that under the laws of the State of Indiana in force at the date of the injuries to plaintiff and at the date of the enactment of said statute there was no liability whatever on the master under the facts unless the terms of said statute are made to apply; that the constitution of Indiana at the date of said enactment and at the time of the injury provided that the laws of that state should be uniform and equal and should not in any way discriminate against any person or corporation; that section 1, article 14 of the constitution of the United States provides that no State shall deny to any person within its jurisdiction the equal protection of the laws; that at the time of said injury and at the date of said enactment and for a period of time beginning many years prior to the said enactment and existing continuously to the present time defendant was and is a person within the jurisdiction of said state of Indiana, at all of said times doing a general railroad business in said state with the express consent and permission of said state and regularly admitted at all of said times to do business therein by the said state. Defendant says that in so far as the terms of said Indiana

34 Statute are made to apply to the facts of this case they are unconstitutional and void; that they are violative of the constitution of Indiana and are violative of said provision of the United States' Constitution. Defendant distinctly raises the federal question that the said statute in so far as made to apply to the facts in this case is violative of said provision of the constitution of the United States and void.

Defendant pleads these matters in addition to and in amendment to its former pleadings herein.

WADDILL & DEMPSEY,
Attorneys for Defendant.

Plaintiff's said demurrer and reply to said additional amended answer filed herein is as follows:

Hopkins Circuit Court.

SPENCER MELTON, Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Demurrer and Reply.

The plaintiff demurs to the amended answer of the defendant this day filed because it does not state facts sufficient to constitute a defense to plaintiff's cause of action.

Without waiving his said demurrer the plaintiff for reply to said amended answer denies that the Indiana Statute pleaded in the amended petition can not constitutionally apply to the facts of this case; or that under the laws of the State of Indiana in force at the date of the injuries to the plaintiff, or the date of the enactment of said statute there was no liability on the master under the fact unless the terms of said statute are made to apply.

He denies that in so far as the terms of said Indiana Statute are made to apply to the facts of this case they are unconstitutional or void; he denies they are violative of the constitution of the State of Indiana or of the said provision of the said United States constitution therein referred to.

Wherefore plaintiff prays as heretofore.

CLAY & CLAY,
GORDON, GORDON & COX,
Attorneys for Plaintiff.

Defendant's said general demurrer to 2nd amended petition and petition as amended filed herein is as follows, to-wit:

Hopkins Circuit Court.

SPENCER MELTON, Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

General Demurrer to 2nd Amended Petition and Petition as Amended.

Defendant demurs to the 2nd amended petition and the petition as now amended because they do not state facts sufficient to constitute or support a cause of action.

WADDILL & DEMPSEY,
Attorneys for Defendant.

Hopkins Circuit Court.

SPENCER MELTON, Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Motion.

Defendant moves the Court to require plaintiff to set out in separate and distinct paragraphs his causes of action pleaded or attempted to be plead herein.

WADDILL & DEMPSEY,
Attorneys for Defendant.

Defendant's said motion to require plaintiff to state more specifically the facts &c., so filed herein is as follows:

Hopkins Circuit Court.

SPENCER MELTON, Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Motion.

Defendant moves the Court to require plaintiff to state more specifically the facts constituting the negligence of which plaintiff complains.

WADDILL & DEMPSEY,
Attorneys for Defendant.

37 Defendant's answer to the 2nd amended petition so filed herein is as follows:

Hopkins Circuit Court.

SPENCER MELTON, Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Answer to 2nd Amendment to Petition.

Defendant for answer to 2nd amendment to petition denies that the injury to plaintiff resulted from the negligence of the foreman; it denies that the plaintiff was bound to or did conform to the order or direction of said foreman; it denies that said foreman was negligent in any of the acts alleged in the petition or amendment thereto or in failing to furnish plaintiff a reasonably safe place in which to work or in giving to him any improper order or in adopting or using improper or unsafe means to perform the work in hand; it denies

that said foreman negligently or at all failed to furnish a reasonably safe place in which to work; it denies that said foreman negligently or at all gave any improper order; it denies that said foreman negligently or at all adopted or used any improper or unsafe means to perform the work in hand; it denies that said negligence caused or contributed to cause the injury complained of; it denies that plaintiff did not know or by ordinary care could not have known of the unsafety of the place orders and means of work (if unsafe); it denies that defendant knew or by ordinary care on its part would have known of such unsafety (if any).

Defendant makes its pleadings heretofore filed part hereof so as to apply to the petition as now amended.

38 Wherefore defendant prays as formerly.

WADDILL & DEMPSEY,
Attorneys for Defendant.

The next order *was* made and entered of record in said action follows:

Hopkins Circuit Court.

Special October Term, 11th Day, November 2nd, 1906.

SPENCER MELTON, Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Order.

This day this action came on for trial; came the parties in person and by attorneys and announced ready for trial. Then to try the issue joined herein came the following jury, to-wit: W. P. McGregor, Dave Fitzsimmons, L. E. Cardwell, W. E. Webb, W. N. Hardin, J. M. English, Enos Prather, G. C. Veazey, W. E. Shadrick, J. E. Arnold, J. H. Brown, and W. D. Crow, who were regularly impaneled, accepted by the parties and sworn to try the issue joined herein and a true verdict render. On motion of plaintiff and defendant B. N. Gordon, official stenographer of this Court, was directed to take stenographic notes of the evidence heard upon the trial of this action. The introduction of plaintiff's testimony was then begun and continued until the hour of adjournment when the jury was allowed to go after being duly admonished by the Court as to their conduct during the hours of adjournment, with instructions to again appear in Court on tomorrow at 8.30 A. M.

39 The defendant is awarded an attachment for L. W. Schmetzer, returnable to the 12th day of this term.

The next order entered of record herein follows:

Hopkins Circuit Court.

Special October Term, 12th Day, November 3rd, 1906.

SPENCER MELTON, Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Order.

This day this action came on for further hearing from the adjournment had herein on yesterday, came the parties and the jury herein came at nine A. M. and took their seats in the jury box when proceedings herein were resumed and continued until the hour of adjournment, when the jury not having fully heard the parties were allowed to go under the usual admonition of the Court with instructions to again appear in Court on Monday at nine o'clock A. M., to which time proceedings herein are adjourned.

The next order made and entered of record herein follows:

Hopkins Circuit Court.

Special October Term, 13th Day, November 5th, 1906.

40

SPENCER MELTON, Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Order.

This day this cause came on to be further heard from the adjournment had herein on Saturday came the parties and the jury herein came at nine A. M. and responded to their names in the jury box, proceedings herein were then resumed and at the conclusion of all the testimony offered by the parties the hour of adjournment having arrived the jury was allowed to go after being duly admonished by the Court as to their conduct during the hours of adjournment and instructed to again appear in Court on Wednesday at nine A. M. to which time proceedings herein are adjourned.

On said 15th day of said term the following judgment was rendered in action, to-wit:

Special October 15th, 15th Day, November 7th, 1906.

SPENCER MELTON, Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Judgment.

This day this action came on to be further heard from the adjournment had herein on Monday, came the parties and the jury herein came at nine A. M. and responded to their names in the jury box. The Court then gave to the jury his instructions in
41 writing and at the conclusion of argument of counsel for plaintiff and defendant the jury retired to their room for deliberation and thereafter returned into open Court the following verdict: "\$22000.00. We, the Jury, agree, and find for the plaintiff the sum of Twenty Two Thousand Dollars in damages. J. H. Brown, Foreman."

Defendant then moved the Court for a judgment notwithstanding the verdict, which motion the Court overruled to which defendant excepted.

Wherefore, it is adjudged by the Court that the plaintiff, Spencer Melton, recover of the defendant, the Louisville & Nashville Railroad Company, the sum of Twenty Two Thousand Dollars with interest from this date until paid and his costs about this action expended, for which execution is awarded.

The next order made and entered of record in said action follows:

Hopkins Circuit Court.

Special October Term, 15th Day, 7th Day of November, 1906.

SPENCER MELTON, Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Order.

The defendant came by attorney and moved the Court to set aside the verdict of the jury and judgment of Court herein and grant it a new trial of this cause and filed written motion and grounds therefor.

Ordered that said motion and grounds be submitted to the Court.

42 Defendant's said motion and grounds for new trial filed herein follows:

Hopkins Circuit Court.

SPENCER MELTON, Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Motion and Reasons for New Trial.

The defendant moves the Court to set aside the verdict of the jury and the judgment of the Court herein and grant it a new trial for these reasons:

1. The Court erred in overruling the demurrer to the petition. It erred in overruling the demurrer to the first amendment to the petition, and to the petition as thereby amended. The Court erred in overruling the demurrer to the second amendment to the petition and to the petition as thereby amended.

2. The Court erred in refusing to give judgment for defendant upon the face of the pleadings.

3. The Court erred in refusing to require plaintiff's causes of action to be set out in separate and distinct paragraphs.

4. The Court erred in refusing to require plaintiff to state more specifically the facts constituting the negligence complained of by him.

5. The Court erred in admitting incompetent evidence.

6. The Court erred in rejecting competent evidence in behalf of defendant.

7. The Court erred in overruling defendant's motion for a peremptory instruction at the conclusion of plaintiff's evidence in chief. The Court erred in overruling defendant's motion for a peremptory instruction made at the conclusion of all the evidence.

43 8. The Court erred in instructing the jury. It erred in giving instructions 1, 2, 3, 4, and 5, and each of them. The charge as a whole was erroneous. Each and all of said instructions were erroneous.

9. The Court erred in refusing each and all the instructions A, B, C, E, F, G, H, and I, offered by defendant.

10. The Court erred in permitting jurors to serve who had personal knowledge of plaintiff's injury.

11. The verdict of the jury is against the law and the evidence. It is not supported by the evidence; it has not sufficient evidence to sustain it; it is palpably against the weight of evidence.

12. The verdict of the jury is excessive, appearing to have been given under the influence of passion and prejudice.

13. The Court erred in refusing to give judgment for defendant notwithstanding the verdict.

14. The Court erred in applying the Indiana Statute to the facts of this case. The Court erred in enforcing the Indiana Statute in Kentucky forum.

15. The Court erred in upholding and applying the Indiana Stat-

ute pleaded in this case when same in so far as applicable to the facts proven in this case is unconstitutional and void. It is discriminatory against defendant and denies it the equal protection of the law. It is violative of the constitution of the State of Indiana and of section 1, of article 14 of the Constitution of the United States, which guarantees to defendant the equal protection of the law.

Each and all of the foregoing errors are prejudicial to the substantial rights of defendant whereby it was denied a fair and impartial trial, entitling it to a new trial and to judgment in its behalf.

WADDILL & DEMPSEY,
Attorneys for Defendant.

44 The next order entered of record in said cause follows:

Special October Term, 30th Day, 24th Day of November, 1906.

SPENCER MELTON, Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Order.

The Court having considered defendant's motion, reasons and grounds for new trial, this day overruled the same, to which ruling of the Court defendant objected and excepted and prayed an appeal to the Court of Appeals which is granted. On its motion defendant is given time until and including the 7th day of the next regular February Term 1907, of this Court, in which to file its Bill of Exceptions and the stenographer's report of the evidence herein, at or before which time same may be tendered and filed.

On December 14th, 1906, the next order was made and entered of record in said action as follows, to-wit:

Hopkins Circuit Court.

Special October Term, 47th Day, December 14th, 1906.

SPENCER MELTON, Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Order.

45 This day came the defendant and tendered its Bill of Exceptions herein and the same having been examined and approved by the Court and so endorsed by the Judge is now filed and made part of the record herein and will be copied as such on the appeal of this cause to the Court of Appeals.

Defendant then tendered the official stenographer's report of the evidence heard upon the trial of this cause together with a carbon copy thereof, and the same having also been examined and approved by the Court and so endorsed by the Judge is now filed, and the original report will accompany the record herein on appeal of this cause to the Court of Appeals as part hereof, and the carbon copy will remain in the office of the Clerk of this Court.

Defendant's said Bill of Exceptions so filed herein is as follows, viz:

Hopkins Circuit Court.

SPENCER MELTON, Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Bill of Exceptions.

Be it remembered that on the trial of this case the evidence was taken by B. N. Gordon, official stenographer of this Court, and his transcript of the evidence certified to by him and approved by the Judge is made a part of this bill of exceptions the same as if copied in full herein.

Upon the conclusion of the evidence for plaintiff in chief the defendant moved the Court to peremptorily instruct the jury to
46 find for defendant for these reasons, viz:

1. There is no evidence of actionable negligence proven.
2. The Indiana Statute upon which this action is based does not apply to the facts proven.
3. In so far as the terms of the Indiana Statute apply to the facts proven they are unconstitutional and void. They are discriminatory against defendant and deny it the equal protection of the law. They are violative of the constitution of Indiana and of section 1, article 14 of the Constitution of the United States, being section 1 of the fourteenth amendment thereto.

4. The said Indiana statutes were not intended to be enforced out of the State of Indiana and are against the policy of the state of Kentucky and not enforceable in a Kentucky form.

Which motion the Court overruled to which defendant excepted. Upon the conclusion of all the evidence the defendant renewed its motion for peremptory instruction which the Court overruled, to which defendant excepted.

Upon the conclusion of the evidence the plaintiff asked the Court to give instructions W, X, Y, and Z, to which defendant objected, and the Court refused to give each and all of said instructions to which ruling of the Court plaintiff excepted as to each and all of said instructions. Said instructions W, X, Y and Z are made part of the record and are as follows:

"The Court instructs the jury that if they believe from the evidence that the jury received by the plaintiff if any was suffered by reason of any defect in the chain mentioned by the witnesses, and

47 that such chain was connected with or in use in the business of the defendant, and that such defect if any was the result of negligence on the part of defendant or any person intrusted by it with the duty of keeping such chain in proper condition, and that plaintiff was at the time he received such injury, if any in the exercise of due care and diligence, then the law is for the plaintiff and the jury will so find."

X. "If the jury believe from the evidence that the injury to plaintiff if any resulted from the negligence of the foreman of the construction crew of which plaintiff was a member, and that such foreman was in the service of defendant, and that plaintiff was bound to conform to his orders, and that plaintiff himself was at the time an employé of defendant, in its service, and was in the exercise of due care and diligence, then the law is for the plaintiff and the jury will so find."

Y. "The Court instructs the jury, if they believe from the evidence, that the injury to plaintiff, if any, was caused by the negligence of the foreman of the crew, in which plaintiff was engaged at work, and that said foreman was in the service of defendant, and that said foreman was at the time acting in the place and performing the duty of the corporation in that behalf, and that plaintiff was at the time obeying and conforming to the orders of said foreman and that said foreman had authority to direct plaintiff in his work, and that plaintiff, himself, was an employé in the service of defendant, and was in the exercise of due care and diligence, they will find their verdict for plaintiff."

Z. "Due care and diligence as the terms are used in these instructions mean such a degree of care and diligence as any ordinarily prudent and ordinarily diligent person would usually exercise under the same or similar circumstances.

48 The terms negligence, as used in these instructions means the failure to exercise ordinary care. Ordinary care is such care as an ordinarily prudent person would usually exercise under the same or similar circumstances."

The Court of its own motion gave instructions 1, 2, 3, 4, and 5 to the giving of each and all of said instructions 1, 2, 3, 4, and 5 the defendant at the time duly objected and excepted. Said instructions 1, 2, 3, 4, and 5 are made part of the record and are as follows:

1. "The Court instructs the jury that if they believe from the evidence that the injury received by plaintiff, if any, was suffered by reason of any defect in the conditions of works or tools connected with or in use in the business of the defendant, and that such defect, if any, was the result of negligence on the part of the defendant's foreman of a construction crew with which plaintiff was working and who was a person entrusted by the defendant with the duty of keeping such tools or works in proper condition, and that plaintiff was at the time he received such injury in the service of the defendant and was at the time in the exercise of due care and diligence, then the law is for the plaintiff and the jury will so find."

2. "If the jury believe from the evidence that the injury to plaintiff, if any, resulted solely from the negligent orders if any of the

foreman of the construction crew with which plaintiff was working, such foreman being then in the service of defendant, and that plaintiff at the time was bound to conform and did conform to the orders or directions of such foreman, and the plaintiff himself was at the time an employe of defendant, in its service, and
49 was himself at the time in the exercise of due care and diligence, then the law is for the plaintiff and the jury will so find."

3. Due care and diligence as used in these instructions means such care and diligence as an ordinary prudent and ordinarily diligent person should exercise under the same or similar circumstances.

The term negligence, as used in these instructions means a failure to exercise ordinary care.

Ordinary care is such care as an ordinarily prudent person would usually exercise under the same or similar circumstances."

4. "If the jury under the evidence and instructions of the Court find their verdict for the plaintiff Spencer Melton, they will award him such sum in damages as will reasonably compensate him for the mental and physical pain and anguish, if any, suffered by him or which they may believe from the evidence to be reasonably certain will be suffered by him hereafter, if any, all as a direct result of his injuries and if the jury believe from the evidence that plaintiff's injuries are permanent then they will award him such sum in damages as will reasonably compensate him for the reduction, if any directly resulting therefrom, in his power to earn money in the future, but in all not to exceed the sum of Twenty-five Thousand Dollars, the amount claimed in the petition.

5. "The Court instructs the jury that they cannot in any event find for plaintiff, because they may believe from the evidence that the chain with which the hitch was made was not reasonably safe if they shall believe from the evidence such condition was unknown to defendant's foreman W. C. Shrode, and would not have been discovered by him by the exercise of ordinary care in time to have prevented the injury."

50 The defendant asked the Court to give instructions A, B, C, D, E, F, G, H, and I, to each and all of which plaintiff objected. The Court gave instruction D, to the giving of which plaintiff excepted. The Court refused to give instructions A, B, C, D, E, F, G, H, and I, to which ruling of the Court defendant excepted as to each and all refused instructions. Said instructions A, B, C, D, E, F, G, H, and I are made part of the record and are as follows:

A. "The Court instructs the jury that the evidence shows that plaintiff was injured on account of a risk hazard and danger which under the law he assumed as employe of defendant, and further that he was not exercising due care and diligence for his own safety at the time he was injured, and further that he was guilty of such contributory negligence as to bar recovery. Therefore on each and all of these grounds the jury will find their verdict for defendant.

B. "The Court instructs the jury that plaintiff in accepting employment and in acting in the service of defendant assumed all the ordinary risks and hazards and dangers incident thereto including

the negligence of the foreman and crew in adjusting the hoisting apparatus and in doing the work of raising the bent of timbers, and if they believe from the evidence that plaintiff received his injury from any such risk hazard or danger they will find their verdict for defendant."

C. "The Court instructs the jury that the defendant is not liable in this case for the negligence (if any) of foreman W. C. Shrode in the methods, manner or means adopted or used by him or his crew in adjusting the blocks and tackle or in doing the work of raising the bent of timbers and if the jury shall believe from the evidence that the injury to plaintiff was proximately caused thereby they will find their verdict for defendant."

51

D. "Although the jury may believe that under the law and evidence defendant was guilty of negligence, yet if they further believe from the evidence that plaintiff was guilty of negligence but for which he would not have been injured they will find their verdict for defendant."

E. "The Court instructs the jury that plaintiff cannot in any event recover in this action unless they shall believe from the evidence that he was himself exercising due diligence and ordinary care for his own protection, and further that he did not know and by the exercise of ordinary care would not have known of the unsafe appliance (if unsafe) or the improper manner of doing the work (if improper) which caused or contributed to cause his injury."

F. "The Court instructs the jury that plaintiff did not have to place himself in a position of palpable danger even if positively ordered by his foreman, and if they shall believe from the evidence that he placed his person beneath the ascending bent and that such was a position of palpable danger which should have been known to an ordinarily prudent person in the exercise of due diligence and ordinary care, then they will find their verdict for defendant."

G. "Although the jury may believe from the evidence that the appliances used in raising the bent were attended with danger or not so safe as others, yet they cannot find for plaintiff on that account, as in any event the master is only bound to ordinary care to furnish the servant reasonably safe appliances."

H. "The Court instructs the jury that they cannot in any event find for plaintiff because they may believe from the evidence that the chain with which the hitch was made was not reasonably safe if they shall believe such condition was unknown to defendant's foreman, W. C. Shrode, and would not have been discovered by him by ordinary inspection in time to have prevented the injury."

52

I. "The Court instructs the jury that they cannot in any event find for plaintiff because they may believe from the evidence that the chain with which the hitch was made was not reasonably safe if they shall believe from the evidence that the foreman, W. C. Shrode or his crew made a selection of such chain from a supply where suitable appliances for such work were at hand for their use."

The foregoing instructions are the only ones offered or refused or given. It is consented by both parties that the original sketch used

upon the trial of the case may accompany the record as part hereof. It is also consented by both parties that the original defective link introduced in evidence may accompany the record.

All proceedings, objections and exceptions noted in the official stenographers transcript and all evidence therein are made part of this bill of exceptions and said transcript is to be taken and treated as part hereof; and by consent of both parties said transcript contains the deposition and opinions read as evidence and all the evidence.

The foregoing bill with the official stenographers transcript contains all the evidence offered and heard upon the trial of this cause and this bill contains all the instructions given, offered and refused and is a full, complete and perfect bill and defendant now tenders same as its bill of exceptions herein and asks that it be filed and made part of the record for purposes of appeal of this cause to the Court of Appeals.

WADDILL & DEMPSEY,
Attorneys for Defendant.

53 It is hereby certified that the foregoing bill and the official stenographer's transcript contain all the evidence heard upon the trial of this cause, and this bill contains all the instructions given, offered and refused and is a complete and perfect bill of exceptions and same is now ordered filed and made a part of the record for the purpose of an appeal of this cause to the Court of Appeals.

J. F. GORDON, *Judge.*

December 14, 1906.

Whereupon defendant caused to be executed before the Clerk of said Court its supersedeas bond as follows, to-wit:

Hopkins Circuit Court.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,

vs.

SPENCER MELTON, Defendant.

Supersedeas Bond.

Whereas the appellant, the Louisville & Nashville Railroad Company has taken an appeal from a judgment of the Hopkins Circuit Court, rendered at its Special October Term, 1906, against it in favor of the appellee, Spencer Melton, for Twenty Two Thousand Dollars, with interest thereon from November 7th, 1906, and his costs in said behalf expended, and the appellant desires to supersede the said judgment, now we, the said Louisville & Nashville Railroad Company, principal and M. H. Smith of Jefferson County Kentucky its surety, hereby undertake and covenant to and with the appellee Spencer Melton, that the appellant will pay to the appellee all costs and damages that may be adjudged against appellant on the appeal, also that it, the said Louisville & Nashville Railroad Company will satisfy and perform the judgment

appealed from if it should be affirmed, and any order or judgment which the Court of Appeals may render or order to be rendered by the inferior court, not exceeding in amount or value the original judgment.

Witness our hands this 14th day of December, 1906.

LOUISVILLE & NASHVILLE
RAILROAD CO.

M. H. SMITH,

By C. J. WADDILL,

Of Hopkins County Ky., Att'y in Fact.

Attest:

D. W. GATLIN,

Clerk Hopkins Circuit Court.

See power attached.

Whereas Spencer Melton has lately recovered a judgment for \$22,000.00 and interest and costs against the Louisville & Nashville Railroad Company in the Hopkins Circuit Court, and said Louisville & Nashville Railroad Company has prayed an appeal from said judgment to the Court of Appeals of Kentucky, I, M. H. Smith, of the County of Jefferson and State of Kentucky, hereby appoint and constitute C. J. Waddill, of the County of Hopkins, State of Kentucky, my true and lawful attorney in fact to execute for me and in my name the necessary appeal and supersedeas bond as surety for said Company pending said appeal.

This 10th day of December, 1906.

M. H. SMITH.

Witness:

M. J. REEDY.

55

Hopkins Circuit Court.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,

vs.

SPENCER MELTON, Appellee.

Supersedeas.

I do certify that an appeal has been granted by the Hopkins Circuit Court from a judgment rendered at its Special October Term, 1906, in favor of Spencer Melton, against the Louisville & Nashville Railroad Company for Twenty Two Thousand Dollars with interest therefrom from November 7th, 1906, and his costs in said behalf expended, and that a supersedeas bond has been executed.

Therefore the appellee and all others are commanded to stay proceedings on the judgment above recited.

Witness my hand as Clerk of said Court, this 12th day of December, 1906.

D. W. GATLIN,

Clerk Hopkins Circuit Court.

Executed the foregoing supersedeas on Spencer Melton, appellee, by delivering a true copy of same to said Spencer Melton, December 14th, 1906.

S. C. JENNINGS, S. H. C.

Defendant then filed its schedule herein as follows, to-wit:

56

Hopkins Circuit Court.

SPENCER MELTON, Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Schedule.

On the appeal of this case to the Court of Appeals the Clerk of the Hopkins Circuit Court will copy the entire record herein, except summons and return, subpoenas and returns, and the official stenographer's transcript of evidence, the original of which will accompany the record.

December 14th, 1906.

WADDILL & DEMPSEY,
Attorneys for Defendant.

57

STATE OF KENTUCKY, *County of Hopkins:*

It is hereby certified by the undersigned Clerk of the Circuit Court in and for the County and State aforesaid, that in the matter of appeal to the Court of Appeals of Kentucky by the Louisville & Nashville Railroad Company from a judgment of the Hopkins Circuit Court rendered at its special October Term, 1906, against it in favor of Spencer Melton, the foregoing forty three pages contain a true and correct copy of the entire record in said action except summons and return, and subpoenas and returns, and that the same, together with the official stenographer's transcript of the evidence heard upon the trial of said action, which transcript is made part hereof, is a full, true and complete transcript of the entire record in said action as called for by schedule filed by appellant and copied therein.

Given under my hand as Clerk of said Court, this 14th day of December, 1906.

D. W. GATLIN,
Clerk of Hopkins Circuit Court.

58

And with said transcript there was filed a Transcript of testimony, and which is in words and figures as follows:

59 Hopkins Circuit Court, Special Term, Nov. 21, 1906.

SPENCER MELTON, Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Transcript of Evidence.

Clay & Clay and Gordon & Gordon & Cox, Attorneys for the plaintiff.

Waddill & Dempsey, Attorneys for Defendant.

Statement of the case to the jury by W. L. Gordon for plaintiff.

Statement of the case to the jury by C. J. Waddill for defendant.

Attorneys for plaintiff ask to see the chain which was used on the occasion of the injury; to which the defendant excepts; and the defendant's attorneys state that this is the first knowledge they have had of the desire to see the chain.

By the COURT: The Court at this stage has nothing before it upon which it could act or have either party introduce anything.

Attorneys for the defendant produce a broken chain link in open court.

60 The plaintiff SPENCER MELTON being sworn takes the stand in his own behalf, and being examined by Mr. Clay testifies as follows:

1. You the plaintiff in this action, Mr. Melton?

A. Yes, sir.

2. What is your age?

A. I will be 31 years old my next birth day.

3. How old were you in March, when you were hurt, 1905?

A. 28.

4. What was your condition of health at that time?

A. My condition was good.

5. Healthy man at that time?

A. Yes, sir, perfectly sound.

6. Able bodied?

A. Able bodied.

7. By whom were you employed at the time you were hurt?

A. I was directed by Mr. A. V. McVeay by letter.

8. By what Company were you employed?

A. L. & N. Railroad Company.

9. Who employed you for the L. & N., to whom were you directed to report?

A. W. C. Shrodes.

10. How long were you employed before you were injured?

A. I think it was about eight weeks something like that.

11. You had been working for the L. & N. Railroad Company for eight weeks?

A. Yes, sir, and lot before——

12. That period of eight weeks under the supervision of Mr. Shrodes, was he the foreman?

61 A. Yes sir.

13. Any one else have charge of the crew you were working with except Mr. Shrodes?

A. No sir.

14. When did you commence working on that trestle?

A. I do not know just exactly the date; must have been from six or eight days before this happened.

15. Where did the accident happen?

A. At Howell, Indiana; on the St. Louis Division at Howell, Ind.

16. What were you doing there?

A. In the employ of the L. & N. Railroad Company as a carpenter.

17. How many were in the crew with which you were employed?

A. Six besides the boss.

18. What was that crew doing at the time you were hurt,—what work engaged in?

A. Bridge carpenters' work.

19. At what particular place and at what particular work?

A. At Howell, Ind. on the St. Louis Division, at the carpenter's trade.

20. What kind of building or structure were you putting up?

A. Coal Tipple to let passenger and freight trains coal the engines.

21. What were you employed to do?

A. Carpenter's work.

62 22. Who were you directed to report to and who were you working under?

A. I was directed to report to W. C. Shrodes by Mr. McVeay.

23. Who was the compensation agreed on with?

A. Mr. W. C. Schrodes.

24. What amount was he to pay you?

A. \$2.25 a day.

25. You were employed to do general carpenter's work you say?

A. Yes, sir, just hired as a laboring man in the capacity of carpenter's work.

26. What was the general nature of your employment, your work?

A. By the boss as he told us.

27. That was the only direction he gave you?

A. That was all I had.

28. To do what the boss told you to do?

A. Yes, sir, sent to him and he was to take charge of us.

29. He was the boss?

A. He was the boss.

30. Had you been engaged during that eight weeks you were employed by the Company in lifting any trestles of this kind for the L. & N. Railroad Company?

A. We had not.

31. This was the first work under the employment of the L. & N. you were to do of that kind?

A. It was.

32. During that eight weeks had you been lifting any heavy timbers with block and tackle before?
- 63 A. No sir.
33. That happened at Howell, State of Indiana?
- A. Yes sir.
34. Do you remember the day of the month?
- A. I think 2 day of March.
35. 1905?
- A. About ten thirty o'clock in the year 1905.
36. The whole crew was engaged at that time at that work?
- A. Every one was active.
37. Where was Mr. Shrodes while that work was going on?
- A. He was on the opposite side of the span that fell.
38. The time that the work was being done?
- A. He was seeing after the work, how it was going on, telling what should be done here and there.
39. You started to tell when you commenced to construct that trestle work, when was it?
- A. On Monday morning.
40. Do you remember how;—had you been doing any work there the week before?
- A. Yes, sir, I think we had; we were sent to St. Louis on Saturday.
41. What part of the work was done the week before?
- A. The foundation started.
42. When you went back there and started to work on Monday morning; what part of that work did you do on Monday, if you remember?
- A. I think we framed the bents together, some one or two spans and raised the second span.
- 64 43. That is the two spans that are standing there?
- A. Yes sir.
44. Before you commenced raising these spans did any preparation have to be made, getting the block and tackle ready;—who did that?
- A. The men in general.
45. How was the block and tackle fastened up? Begin right there before that block and tackle was put up and tell all that occurred between you and Mr. Shrodes or other members of the force before the work was done at all, before any trestle was raised?
- A. Mr. Shrodes came and threw a chain on the ground while I was working with the — and says to the boys, they were standing around here and there, working;—he says put that chain on up there; and Smith taken the chain and went up the ladder to put it on and I put the block on my shoulder and went up the ladder and handed Smith over the block, and the other boy, one of them, had hold of the rope pushing it up so as to take some of the weight off of me and Smith taken the chain and put it in its place.
46. You say Mr. Shrodes brought the chain up and pitched it down?
- A. Mr. Shrodes threw the chain on the ground and says put the chain on.

47. Do you know where he got that chain?

A. No, sir.

48. Had you seen it before?

A. No, sir.

49. Did you have your hands on it at any time or examine it?

A. I did not.

50. Did you have your hands on it any time after it was put up and before the bent fell?

A. I did not.

51. Why didn't you examine it?

A. Was not my business.

52. Whose business was it?

A. I suppose the boss'es.

(Defendant objects; sustained.)

53. The boss furnished it to you?

A. Yes, sir, he threw it down there and says put it on.

54. Did you rely on any one to inspect it before it was used?

A. No, sir, not particular I did not; I did not have any fear of a man ever putting me in danger; I supposed it was safe.

55. You just used the chain that the boss told you to use?

A. Yes, sir, expected his judgment to be sufficient.

56. The two bents you say was raised there on Monday before you were hurt on Tuesday?

A. Yes, sir.

57. It was on Tuesday you say this third bent was being raised when you were hurt?

A. Yes, sir.

58. Who were down at this end of the rope when you were hurt?

A. I cannot remember that; it was about sixty feet away from me.

59. Who made that diagram?

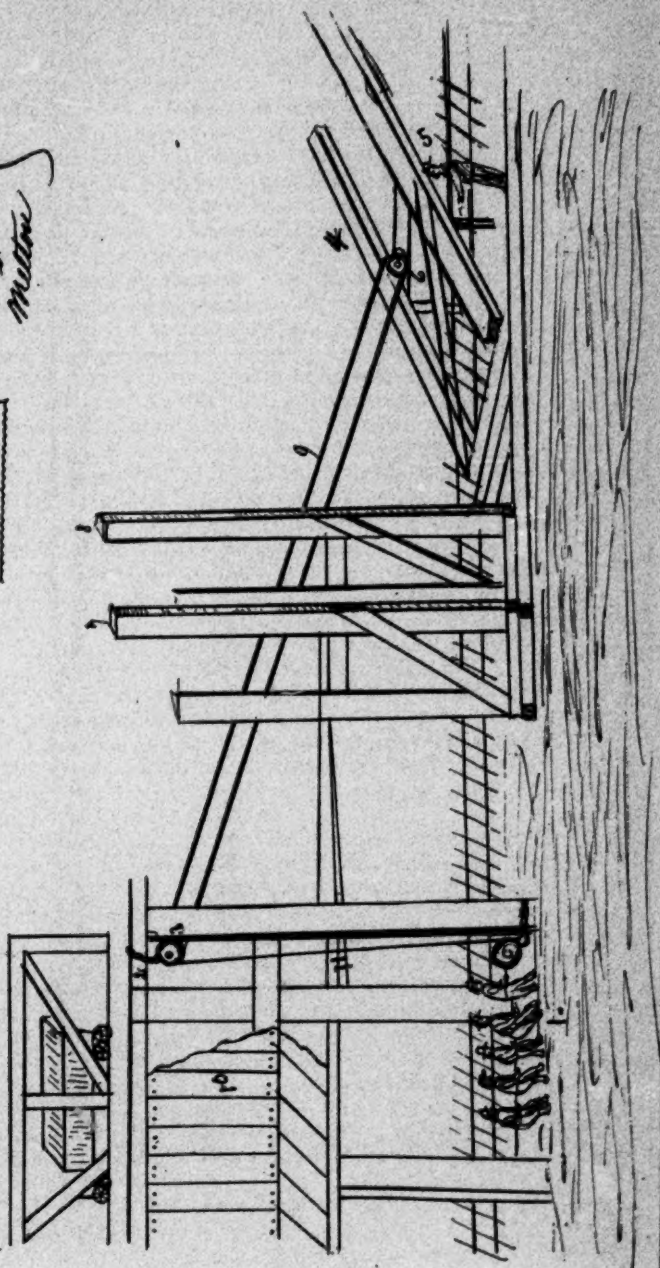
A. I made this diagram.

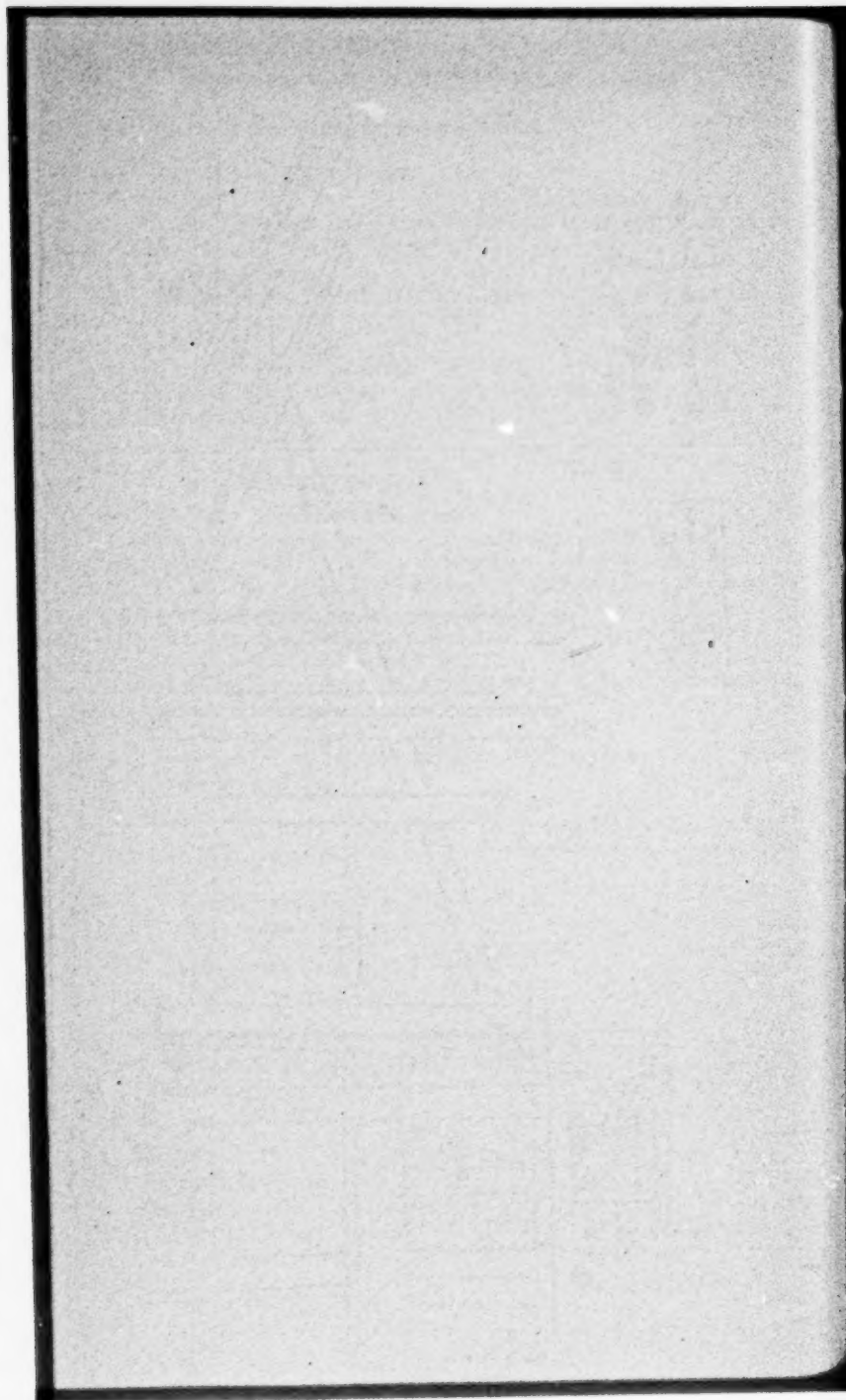
(The map or diagram is as follows:)

(Here follows diagram marked page 66½.)

No. 435.
 L. N. R. R. Co. } p. 66 1/2
 Melton

CHAS. C. HUTZENBERG.
 Official Copyist Court of Appeals
 KENTUCKY





67 60. Just explain it to the jury as far as you can; point out the places there of interest. First, is it a correct diagram in your judgment of the surroundings there and the condition things were in at the time you were hurt?

A. It is and I will swear before God it is.

61. I hand you the diagram with the place where the men were standing pulling marked 1; the chain around the square piece of timber marked as 2; the pulley marked No. 3, and bent in a slanting position marked No. 4; place where one man was standing marked No. 5; and another man standing marked No. 6; one standing bent marked 7; and one standing bent marked No. 8; the ropes reaching from the pulley marked 3 to the bent marked 4 being marked No. 9; and the old structure being marked No. 10; the rope leading from No. 3 to the ground near where the men were standing at No. 1, being marked No. 11. Explain the diagram to the jury?

A. No. 1 is five men with the rope in hand with their heels against the ground pulling slow on the rope; rope running to block No. 2 around a square sill 22 feet or thereabout from the surface of the earth; No. 3 was three way block running to span No. 4 thereby to travel in span on block that run from or in contact with No. 3 go its — which rests on two way block; No. 5, as the span was going up by the force being pulled by these men, I, Spencer Melton, stood where my boss directed me to stand with this span about my waist which is 22 feet

68 from here to here six by eight green oak and this piece across here morticed there and below here. This chain broke at No.

2 and let this span fall striking me on the shoulder, bent my back across this sill here; this sill runs cross ways the same as that from sill to sill over here; broke my back in the small part of the back. No. 6 is Mr. Shroades who stood directly on the other side almost in the same position; he was a little further out from under this span or brace; the falling of the piece may have thrown it; I cannot say just what position he was standing; but he stood directly on the opposite side; I was directed to put this post we had under here by him and to hold it.

62. No. 7 was a span that stands like this span, was raised the day before, brace across to this old structure; No. 8 the span that was raised after that; No. 9 is four ropes, or in fact one rope an endless rope passing through this to a three block way that went down below down to the ground; No. 10 is an old structure; not an old one but older than the one we were constructing and cars that run on top of it filled with coal run out from a right angle to let the coal around here to pour down into this place to coal the locomotive engines; and No. 11 was the down pull that lets it to the ground.

63. You were engaged then in lifting No. 4, or bent; what was your object; what did you want to do with that bent?

64. Wanted to stand it up like this one here so as to make it straight up and down like this one here; that is bent No. 4 this is the chain that broke, right here; I was holding to a piece like this.

69 65. How was that chain fastened up there so as to attach it to that bent.

A. It was put around there, but I do not know exactly how held there, put around a square beam.

66. About how long was that chain?

A. I guess about 36 or 40 inches; look chain for an old wagon.

67. The chain was fastened around that timber and was a ladder standing here.

A. The ladder sat against this post here.

68. Smith you say went up that ladder?

A. Smith went up that ladder and taken the chain and put around that piece; I followed with this rope and took the block and handed to Smith and Smith hooked it in the chain.

69. You do not know how he hooked it in there or how he fastened it?

A. No, sir.

70. After you had got down, what was then done?

A. Come around and Mr. Shrodes says raise the end of this span and put a block under it, and we raised it to about six feet; we began to raise the span and set props under it, short ones and got them a little longer, and little longer. I was called in the process to take my part; my name was not called exactly, but just boys at work. Clarence Hopkins stood behind me until the span got up so high he was of no use there I suppose. Mr. Shrodes says Clarence go and help the boys; and Clarence jumped down and went to help the boys and I got an iron bar and stood it up out in front of me like that in order to rest the span upon, and he says don't use that, get a piece of wood; I threw the bar down and went back and got a piece of wood and lifted it and placed it in place.

71. What were you doing when the timber fell that did fall?

A. I was standing there holding that bar as I was directed to.

72. You say Mr. Shrodes was on the other side with a piece of wood in the same position?

A. Yes, sir.

73. He was supporting on the other side?

A. Yes, sir, just like this one.

74. Is one side of that bent longer than the other?

A. Yes, sir.

75. Do you know how much longer?

A. No, sir, I could not tell exactly. But I think the other was four or six feet something like it shorter than the 22 foot piece.

76. While standing in that position what happened?

A. The chain broke and let the span fall upon me breaking my back, breaking these ribs on this side and breaking this knee and this hip.

77. Were you unconscious?

A. No, sir, I was not; of course I was — to a great extent, but not unconscious.

78. Did you see this thing fall?

A. I saw a flicker or something; all done so quick, I could not tell.

79. After you saw any indications; after you fell could you have gotten out from under it?

71 A. No, sir, it would have been an impossibility; it was quick as a gun shot.

80. Were you on the long or short side of the bent?

A. On the long side with a piece running over my shoulder back to the foot which was about three by ten; the end of a large brace lying there, two of them on me; that cross beam which was the same size of this piece and this brace running from here down across there came down, the weight of it was on my shoulder.

81. When you were working there did you know that chain was defective or unsafe?

(Defendant objects, sustained; plaintiff excepts).

A. No, sir, I did not.

82. Were you told about any defects in the chain?

A. No, sir.

(Defendant objects; sustained; plaintiff excepts).

(Question and answer withdrawn by the plaintiff.)

83. If the chain was defective did you know anything about it?

A. I did not.

84. Did you have any information about it?

A. I did not.

85. Did you examine the chain?

A. I did not.

86. Did you have any opportunity to examine it?

A. I did not.

87. If that chain was an improper appliance to be used in that place, did you know anything about it?

A. I did not.

88. Did you see that chain after you were hurt?

A. I think the boss threw it down on the floor.

89. After you——?

72 A. They carried me in the engine room, and I think he threw it down on the floor.

90. Did you see it?

A. I saw it, yes, sir.

91. I will ask you whether that chain that broke was the same chain that had been placed up there that the boss threw down in front of you and ordered put up there the day before?

A. The boys all say it is.

92. You saw the chain?

A. Yes, sir.

93. State whether or not that was the same chain?

A. It must have been, yes, sir, undoubtedly was.

94. This is the link Mr. Waddill brought; do you know whether that is the link from that chain or not?

A. Yes, sir, that was like the chain I saw him pitch over there.

95. Do you know whether or not it was a straight or crooked link chain?

A. Crooked link chain; that is a piece of an old lock chain from the wagon, had a ring in it and just took and pitched it over and

Smith was the closest man, and he grabbed it and went up the ladder.

96. Do you know what size chain that is?

A. I judge from measuring it here it was between a quarter and $\frac{3}{8}$ of an inch.

97. What did the chain look like when Mr. Shrodes threw it down?

A. He just had it in one hand and threw it down that way, and I was about here.

73 98. What kind of chain was it?

A. It was a lock chain from a wagon, which had a long crooked piece on the end about that long, and it turned over like you lock a wagon with.

99. Same kind of chain used on an ordinary farm wagon?

A. Yes, sir, just the same kind.

(The link of the chain is submitted to the jury who examine it).

100. Whose orders were you under your employment to conform to?

A. Mr. W. C. Shrodes.

101. At the time you were hurt state whether or not you were conforming to these orders?

(Defendant objects; overruled; defendant excepts).

A. I was obeying my orders.

102. Mr. Melton, how *what* that pulling done; was it a straight steady pull, or was it some other kind?

A. No, sir, they would halloo,—some of the boys, would halloo, he, ha, and give a jerk; when they would halloo he they would hold and get ready, and ha to pull and went in kind of a jerk; everybody got ready and threw his whole force against the chain, just like you would to music.

103. It was not then a straight steady pull all the time?

A. No, sir, could not possibly been; that would not work at all, would not pull up.

104. Do you know the dimensions of these timbers in that bent?

74 A. Six by eight 22 feet long; the next this piece that went across on span No. 4 was eight inches wide this way, I would not be sure whether eight or ten, and three inches thick this way, and this piece I think was 13 feet long across here; and this piece was some four or five feet shorter than 22.

105. Do you know whether or not there were any other timbers on the bent not shown on the diagram?

A. I do not know whether or not we had that long piece from there up or not.

106. Do you know there is a long piece used there?

A. Yes, sir, there was a piece to be put on.

107. You do not know whether that was on before or after?

A. No, sir.

108. What kind of timber was that?

A. Oak.

109. What kind of oak?

A. Good oak.

110. Dry or green?

A. Green.

111. How green?

A. It come out of the saw mill little above there and run on the Y on the cars. Come out of the river.

112. How do you know it come out of the river?

A. That is where they get all the logs and timber there for the saw mill, on the bank of the river.

113. You say it was green oak timber?

A. Yes, sir.

75 114. Whose orders were you conforming to when that bent fell?

(Defendant objects; overruled; defendant excepts. Question withdrawn by plaintiff.)

115. If you were conforming to anybody's orders, whose orders were you conforming to?

(Defendant objects; overruled; defendant excepts.)

A. Mr. W. C. Shrodes, the foreman.

116. Just explain to the jury how you were hurt, you started on to it once or twice?

A. Gentlemen of the jury, these five men—

117. I mean how were you injured in your person?

A. This span falling on me fractured this knee and this hip and these ribs on this side, all of them; on the right side of the body the ribs were broken; on the left leg the knee was fractured, and right side of body hip was fractured, and in the small of the back, my back was broken.

118. How did these injuries effect you at the time you were injured?

A. They effected me almost serious; there was no feeling at all in either limb; the feeling returned in a few days, I guess eight or ten days, in one limb partially; the other limb it has never returned; the bladder is hard to extricate the water; have no feeling in the penis at all; I have no use for a woman at all; I have no sexual power; the bowels have to be moved with an instrument, and it is a very hard matter to make water at all; it is just a hard strain;

76 When I have fever at time cannot make water,—have to use a rubber tube to let the water out of the bladder; I have no feeling at all in the sexual organs; no feeling in that foot; no use of myself at all from the knees down; I can take and reinforce the limb by getting a slight substance under here can straighten out my foot like that, but no movement in my foot,—no movement below the knees.

118½. What about the movement in your right leg?

A. It is just a little worse than the left leg; it has no feeling at all; no movement hardly at all in the right leg.

119. Has it effected the size of your limbs in any way?

A. Yes, sir, fallen off from 135 to 116 pounds, my weight was 145 when I was first hurt, but ten days after that I weighed 135, and now 116.

120. Can you bear any weight on your limbs?

A. No, sir, not a particle.

121. How was your back effected?

A. My back just feels like you take your wrist and double it down that way in a continuous strain; has continuous pain all the time.

122. Any appearance of the wound still on you there?

A. It is all broken and set out like that; the bones you can see them how they—

123. Turned out?

A. Yes, sir.

124. Is that just one place or more than one place.

A. It is at the two bones, large bones, two bones right at the base of the small part of the back is thrown angling or quartering; up in the middle of the back turns out.

77 125. And then bottom of the back turns in?

A. The tail bone, the coccyx, a little round bone, that is broken.

126. You say that sticks in?

A. Yes, sir, that is broken and turns in.

127. Can you stand or walk in any way at all?

A. No, sir.

128. How did it effect you at the time and how long as to physical suffering.

A. I have suffered pain all the time; at times I have other pains mixed in with them.

129. How was it immediately after you were hurt?

A. I had no feeling in the lower limbs; it was almost comfort then until—of course gave me morphine.

130. You say that lasted eight days?

A. Eight or nine.

131. After that?

A. After the cohesion began to come up I began to suffer a steady pain all the time.

132. Was that pain severe or otherwise?

A. Yes, sir, it was severe at times and is now at times.

133. How long did that severe pain continue.

A. I should judge about may be four to six weeks any how; as long as I sip blood; I had this lung injured by the broken ribs mashed in on it and at times now I spit blood, cough and spit

78 up blood caused from the injury of that lung.

134. Did you ever spit blood before that?

A. No, sir, I was sound as a dollar all my life.

135. After about six weeks you say that severe pain began to ease up?

A. Yes, sir, so I could sorter see the ceiling lying on the bed and tell what it was; I could live, but still I have these pains now and very often have to take a dose of medicine to allay the pains at nights.

136. Are you entirely free from pain at any time?

A. No, sir, I have pain all the time; if you had what pain I have now you would want to halloo for the doctor.

137. What was your mental condition during this time?

A. My mental condition is impaired greatly.

138. I say your mental condition; how was your suffering of mind?

A. My mind would return and go at flashes; would go and return at flashes.

139. Did you suffer any mentally?

A. Yes, sir, I did.

140. How long did that mental suffering continue?

A. Lasted about six weeks or such a matter.

141. Do you have any mental suffering now?

A. I am forgetful at times.

142. At the time you were hurt what was your average earning capacity?

(Objected to and sustained.)

143. Just tell the jury what you were earning; what you had been earning prior to that?

79 A. In Chicago I was earning \$3.75 a day; and the winter got severe and cold and could not work on account of the coldness, the railroads were blocked with snow and ice and they sent us down south, home until they got ready, with some material at Edgefield, Tenn. Mr. — told us we had better go home until the cold weather was over, and would put us out on that; and he was giving us \$3.75 per day.

144. How long did you work for that?

A. I had been at work for it, I suppose—commenced with them at \$2.50 a day two or three years ago.

145. You said you were working,—your wages at the time you were hurt was how much?

A. \$2.25, rather than lay idle, I would work because I was trying to pay for a home for my father and mother.

(Objected to by defendant; sustained. Plaintiff's attorney ask that the answer be withdrawn and that the court admonish the jury; the court admonished the jury not to consider the answer.)

A. From \$3.75 to \$2.25.

146. From \$2.25 to \$3.75 is what you were earning?

A. Yes, sir.

147. What part of the year did you work?

A. All the part could; some times would work out in the rain when it rained; when was not raining would work all the time; of course had to lose some little time but did not lose much.

148. Do you know whether or not your injuries are permanent?

A. The physician in St. Louis—

80 149. Do you know it?

A. Yes, sir, they are permanent; I am satisfied of that.

150. Have you made any efforts to become cured?

A. I have been to every doctor I know of and consulted every one I could get money to go to.

151. Explain to the jury what physicians you have consulted? And what ones have treated you?

A. Consulted Dr. McLean and his staff in St. Louis——

152. Did Dr. McLean make an examination of you?

A. Made a personal examination.

153. Did you get any appliance from his establishment?

A. Yes, sir.

154. Including his examination and consultation and the appliance you got in attempting to be cured, what was his fee or bill?

(Defendant objects; sustained; plaintiff excepts.)

A. \$300.

155. When did you first realize or know that your injuries were permanent?

A. When Dr. McCoy in Evansville and——

156. First when did you know it?

A. Just about two or three days after it was done, when I was in the hospital.

157. That is when you first realized your injuries were permanent?

A. Yes sir.

81 158. Did you after that suffer any mental distress?

A. I certainly did.

159. What was that caused by?

A. By when I thought I was going to die.

(Defendant objects; overruled; defendant excepts; question and answer withdrawn by plaintiff's counsel.)

By the COURT: Gentlemen of the jury, you will not consider the question or the answer to it as to what caused his distress.

(Adjourned to next day.)

82 (Met pursuant to adjournment; direct examination continued.)

160. You started to tell yesterday the physicians and surgeons who had treated you since injured; begin and tell what efforts you have made to effect a cure and who has treated you since you were hurt; you could not tell about the conversations?

A. Dr. McCoy was the first physician; I was taken by him in the ambulance wagon to St. Mary's hospital in Evansville, Ind. and was treated by him and the doctors of the hospital; I do not know the doctors' names that were under him; but Dr. McCoy was the principal doctor.

161. How long did you remain there?

A. I think about perhaps thirty days.

162. Where did you go to from there?

A. From there home.

163. Where did you live at that time?

A. Nortonville, Hopkins county, Kentucky.

164. How long had you been living in Hopkins county?

A. Been there about a year and a half at that time.

165. What treatment did you undergo while at Nortonville?
 A. I received treatment from Dr. Lovan during the time I was at Nortonville.
166. How long did you remain there under his treatment?
 A. I think about four or five months.
- 83 167. Where did you go to from there?
 A. Chicago, Illinois.
168. Were you treated by any one in Chicago?
 A. By Dr. A. J. Arsnee.
169. What position does he hold there?
 A. Chief surgeon, renowned surgeon of one of the chief Hospitals in the United States.
170. Where did you go to from Chicago?
 A. Came back home to Nortonville.
171. Whose treatment were you under during the time you remained at Nortonville?
 A. Dr. Lovan.
172. Where did you go to after that?
 A. Went to Madisonville, Ky., moved here.
173. Have you been under treatment since you moved here?
 A. Yes, sir.
174. What physician treated you here?
 A. Dr. Ross, the old doctor, W. S. Ross; and Dr. Parker and Dr. Gouch.
175. By whom else were you treated, if any one?
 A. Dr. Bone.
176. Were you under treatment of any other Hospital after you came to Madisonville?
 A. Yes, sir, I went to St. Louis.
177. Under Dr. McLean?
 84 A. Yes, sir, Dr. L. C. McLean.
178. Are you under treatment now?
 A. Yes, sir, constantly.
179. Who is treating you now?
 A. Dr. Parker and Dr. Ross.
180. They have treated you ever since you have been in Madisonville?
 A. Yes, sir.
181. How has your injury effected your capacity to earn a livelihood?
 A. It has completely cut off every possibility of making a living.
182. What were your means of livelihood before you were hurt?
 A. It was laboring; laboring in capacity of carpenter's work.
183. That was your trade?
 A. Yes, sir.
184. Can you follow that trade now?
 A. No, sir, I cannot.
185. Did the injury cause you to suffer any physical pain at the time?
 A. I should say it did; I would rather have died any time; that is the way I felt about it; I suffered ten thousand deaths; I suffered untold death; no human can describe the depths of it.

186. Did it cause you to suffer any pain of mind?

A. Yes, sir.

187. How?

85 A. I was grieved to death and my mind would just give down on me at times and it does some times now; when I get sick and have fever I just give up; entirely give up.

188. The L. & N. Railroad runs through Hopkins County?

A. Yes, sir.

189. And you were a resident of Hopkins County at the time you were hurt?

A. Yes, sir.

Cross-examination:

1. At the time you were hurt how long had you been in the business of carpenter?

A. I have been a mechanic all my life.

2. Had you had considerable experience in the lifting of timbers?

A. I have only experience in the use of tools; I was not a structural foreman or structural man; just simply a carpenter with the use of tools.

3. How long had you been working in erecting structures prior to your injury?

A. I had been working at the carpenter's trade at railroad building I suppose about seven years.

4. In the carpenter's trade, did you assist in erecting structures?

A. I assisted as an ordinary workman in the capacity of putting up frames,—putting bents together and chis-ling and using the ax.

86 5. At the time of your injury you were working in a carpenters' gang under W. C. Shrodes as foreman, is that correct?

A. Yes, sir, employed as a carpenter, and W. C. Shrodes was foreman and director of the gang.

6. The carpenters' gang at the time consisted of W. C. Shrodes and six under him, is that correct?

A. Six men who labored for him and as he said; he had a right to hire and fire.

7. The particular work which was being done by your gang at the time you were injured was the erection of coal chutes at the Engle Coal Mines, is that correct?

A. They took us off there Saturday and run us to St. Louis and brought us back, and I went home Sunday night; we was sent to any where they wanted us.

8. The work at which you were engaged at the time of your injury was the erection of additional coal chutes at the Engle Coal Mine, is that correct?

A. Yes, sir, that is correct.

9. The Engle Coal Mine is the property of the Engle Coal Co., is it not?

A. I do not know; I supposed it was the L. & N.'s work.

10. Do you know the nature of terms of the trade which the

Railroad Company was erecting this coal chute for the Engle Coal Company?

A. I know nothing of their business whatever; all we done was to get our money and get away when the pay car come.

11. At the time you were injured, were you assisting by setting props under the bent as it was being lifted, is that correct?

87 A. At the time I was injured I was holding a prop in position under the directions of the foreman; that might be called a "johnnie" pole like to set up that way and prop a heavy bent that might be raised.

12. You were at the time prop-ing one side of the bent that was being erected for the coal chutes, is that correct?

A. I was, under the direction of my foreman.

13. Your foreman that you speak of was Mr. W. C. Shrodes?

A. W. C. Shrodes.

14. At that same time he was doing like work in prop-ing the other side of the bent as it was being erected, is that correct?

A. He was on the other side with a piece in his hand as I were on this side.

15. Was he not doing work on his side similar to the work that you were doing on your side?

A. I should judge that he was; and I was following imitating him, not he imitating me.

16. When the bent of timber which you and he were erecting fell it injured both you and the foreman, did it not?

A. I did not see Mr. Shrodes' injuries; he told me it knocked a hole in his foot and hurt him a little; he limped quite a while after that; it broke my back and fractured this knee and this hip bone.

17. Never mind the injury you have been over that; when 88 did you first know what caused the falling of the bent, when you were injured?

A. I heard the boys all running around there hallooing the chain broke; some would say that old lock chain broke, etc.

18. You had no personal knowledge on the subject as to the breaking of the chain?

A. I did not, only as they threw it down on the floor in front of me in the engine room; I remember seeing the chain, but I was not interested much.

19. Did you observe at that time that it was broken?

A. Yes, sir, they threw the two parts down on the floor.

20. It was broken in two was it?

A. I could not say whether it was broken; there were two parts of it; I do not know just how it was broken; I was in such misery I could not have examined it.

21. Do you know whether or not the weld of a link pulled apart?

A. I do not.

22. Did you at that time give the chain sufficient examination to see whether or not it was an apparently sound chain?

A. If I had taken the privilege to have examined any of these things, or made any efforts about that chain myself as doing such

business, I would have lost my position with the Railroad Company; they would have told me they had a foreman.

23. Did you know the condition of the chain at the time
89 you speak of?

A. I was strictly relying upon the foreman was all, believing that I was perfectly safe.

24. Please answer the question? After your injury did you have such a view of the chain or make such examination of the chain as would enable you to say whether or not that chain was apparently sound, or not?

A. I saw it thrown down in two pieces on the floor in front of me, but my attention was called to the parts,—of getting to the house of a physician; I had no mind to examine the chain; I had no nerve power to settle me while I was examining it; these men had to hold me in position.

25. If I understand you, you were in such a condition that you did not know the condition of the chain except that it was in two pieces?

A. It was broken and the boys went around hallooing the chain was broken; I think some of them used words not used in Sunday school, and said it was the lock chain, etc., that old lock chain.

26. Mr. Melton please answer this question; did you or did you not know after your injury the condition of the chain except that it was in two pieces?

A. I knew nothing of the chain only as it was in two pieces.

27. When foreman Shrodes, before the injury, threw the chain
90 down upon the ground, as you have testified in chief, did you at that time observe anything that was apparently unsound in its condition?

A. I was not supposed to taken any notice of that chain more than to take it from his hands; us men were not supposed to take any notice of that chain more than to take it and place it where he said?

28. Did you in fact observe anything apparently unsound in the condition of the chain?

A. We were not supposed to discover it?

29. Did you in fact observe it; say whether you did or not?

A. I did not have the chain in my hands; I did not use it; I did not pick it up; some other man in the gang picked it up.

By the COURT: Just answer his question whether you observed anything the matter with it?

A. I did not.

30. Who placed block 3 in position for the work in hand?

A. Clarence Smith lifted it from my hands.

31. Where were you at the time it was placed in position?

A. There was a ladder leaning against that down to the earth distance of about 16 feet and I stood on that; he stood on this beam after climbed up there and put on the chain; I handed this block up to him, and the other boys down below some of them hal-d up on the rope; I had it on my shoulder, made it lighter on me to carry up; it was heavy, and he hooked it in there, Clarence Smith.

91 32. Who adjusted the block 3 to the structural fram- at 2?

A. Before it was put on it had to be webbed out; have to take them and balance them up, -nd Clarence hooked that one on it at the top and I think, I am not sure, Clarence McHutchens hooked the other, or Clarence Hopkins, I am not sure.

33. Who placed the chain around the square piece at No. 2?

A. I do not remember,—at No. 2?

34. Yes, sir?

A. Clarence Smith put the chain on at the top No. 2, I beg pardon, I taken this for No. 2 (indicating). No. 2, Clarence Smith put the chain on at No. 2.

35. Clarence Smith, one of the crew placed the chain around the square block at No. 2?

A. Yes, sir.

36. Is that the same chain that broke?

A. Yes, sir, I am told it is the same chain that broke; I saw something flicker out in the air just about half a second before that thing lit on me.

37. How did that chain get into position at No. 2?

A. Clarence Smith put it in position.

38. Where were you at that time?

A. I was down on the ladder with the block on my shoulder; this block No. 3 on my shoulder and ropes dragging from there down to the ground, and the men were pushing it up with their hands that way?

92 39. Was the chain at No. 2 adjusted around the square piece of timber just prior to the placing of block 3 into position?

A. I cannot say just what time it was put on or who put it on, but I think Clarence Smith, Hutches or Hopkins.

40. Where were you at the time that block 3 was fastened to the chain at No. 2?

A. I was climbing down the lad-er, after giving it to him, went back down the ladder.

41. Did you hand the block 3 up to Smith after he had fastened the chain at 2 around the square timber?

A. Yes, sir, with the assistance of another man who held the rope as I said.

42. Who picked up the chain from the ground where the foreman Shrodes had placed it?

A. Clarence Smith took the chain when he brought it in and threw it,—threw it,—kinder alaunch wise and it hit near Clarence; I think Clarence was right in here somewhere, (indicating) and he picked it up; he says put that chain on up there.

43. When were the bents 7 and 8 raised?

A. They were raised on Monday.

44. How long before bent No. 4?

A. We slept that night and come back the next day, next morning as well as I remember.

45. So the bents 7 and 8 were erected the day before bent 4?

A. Yes, sir.

93 46. Did you use the same block and tackle to erect bents 7 and 8 as you did bent 4?

A. This block and tackle was locked in the box that night; if some one did not change it and put one there almost a facsimile, it undoubtedly must have been.

47. At the time you were raising bents 7 and 8 where was block 3 fixed in place?

A. Same position as it was.

48. How was it fastened to the square timber at 2 when you were raising bents 7 and 8?

A. I do not know exactly how Smith,—he might have taken that little tongue to that thing; might have slipped that over and locked it.

49. Was the same chain used in adjusting the block in erecting bents 7 and 8, as in erecting bent 4?

A. Yes, sir, the chain was used, the one that raised the two spans is the one that raised the span No. 4 which was the third span.

50. Was the chain at 2 removed at all from the square timber between the time of raising bents 7 and 8 and bent 4?

A. I do not know; I think the chain was left up there; I am pretty sure it was; the blocks were taken down that night; the block and pullies and wound up in a neat form and put away in the box.

51. Who took the block down that night?

A. I do not remember who unhooked it; I helped put the block in the box and do them up; put all the tools at quitting time—

52. You tell the jury whas was unsafe or improper about that chain that you have personal knowledge of?

94 A. I have not any personal knowledge of the imperfections about that chain; I expected Mr. W. C. Shrodes, my foreman, to put on an appliance that would be sufficient; it was not my place to bulge in to find out and see if I knew any more than the boss; I was always employed to obey my boss and I always done it.

53. If you had thought that chain unsound you would not have gotten under that timber although your boss had so ordered, would you?

A. No more than I would have gone before the muzzle of a loaded gun that was cocked in front of a mad man.

54. If W. C. Shrodes had thought that chain unsound he would not have been in his position, would he?

A. I cannot say.

(Plaintiff objects; sustained, defendant excepts.)

Mr. Shrodes might have forgotten himself.

(Defendant avows that witness should answer, no, not as a prudent man.)

55. Previous to this time had that chain been used by your crew in erecting structures?

A. I never saw it before only on that job, that I know of.

56. Did the foreman have a supply of chains, ropes and pullies and blocks and tackles that he could have used besides this chain that was in fact used?

A. I do not know; the Company furnished anything and all;—
 whenever,—the Company furnished the men tools is all we
 95 had to have done was to ask; that is the way I have done on
 other jobs; all I had to do was to ask and get them.

57. The foreman is supplied and he can get any instruments he
 asked for?

A. They have a warehouse or commissary like and these tools and
 supplies and appliances are asked for by the men on work; they ask
 the road overseer and he gives them an order to the stock keeper and
 he can get what he wants, what he needs.

58. Has the foreman a supply of all kinds of instrumentalities, or
 does he have the selection of them himself?

A. He is supposed to have a supply of all kinds of instruments to
 work with, as to whether he is to select them from the first outgo, I
 could not say. I never have had the capacity of foremanship.

57. As a matter of practice did your foreman make his own selection
 out of the supply?

A. I think he got them kinder in an involuntary way, I do not
 know how he got the chain; but it did not come from the stock room;
 or at least an observation would show they did not have such things
 laying around in their stock room.

58. What I want to know is this, did the Company furnish a supply
 of instrumentalities of various kinds with which to do the work,
 and then did the foreman have the right to make his own selection
 of the instrumentality?

A. I really do not know; but I think the Railroad Com-
 96 pany furnished its block and pullies and crow bars and jack
 screws and such instruments and heavy saws, but as to Mr.
 Shrodes' judgment, I cannot say whether he used his judgment in
 selecting that box of tools; he was supposed to do such things; he
 always called them his tools; that he got them out of the carpenter
 shop and I supposed that he was the man that took care of his tools;
 he said at times if the men lost tools would charge them up with
 them, but was supposed to have plenty of tools.

59. You spoke of earning certain wages in Chicago, what rate
 was it per day?

A. I received the wages of \$3.75.

60. For how many days did you receive such wages?

A. Through the cold winter, we had a harder way of getting along
 and got a little more in the cold winter time than we did—

61. For how long a time did you receive that wages?

A. I suppose six months or such a matter; before that I had received
 \$3, \$2.75 and along there.

62. What were your expenses in Chicago for board?

A. \$6 a week. And car fare on top of that.

63. What were your expenses for lodging?

A. That was board and lodging, No. 808 — street; a distance
 of nine miles if you took the long route.

64. That item of expense of course did not include your—

A. Did not include my laundry, etc.

97 65. Your expenses when you went down south; what did
 you pay down there for board and lodging?

A. I could some time get board for some \$3 a week and \$3.50 and along there, but generally paid \$4; on an average paid about \$4 or \$4.25.

Redirect:

1. Who kept those tools?
A. Mr. Shrodes.
2. Who kept the key, they were kept in the tool box?
A. Mr. Shrodes always kept his key at night.
3. They were in his charge and custody?
A. Yes, sir, and if they were not there he would quibble about it.
4. Who made requisition on the railroad, or got the supplies from the railroad Company, the foreman or crew?
A. The foreman.
5. The crew had nothing to do with that?
A. Had nothing to do; if he would tell us to go after certain supplies, and take an order and go get it.
6. With an order from him?
A. Always have to have an order from your foreman before — can get a pull-y or piece of rope a foot long or anything.

98 Also the witness WILLIAM HILL called for plaintiff and testified as follows:

1. Where do you live?
A. Howell, Ind.
2. What is your occupation at Howell?
A. Occupation, laborer.
3. What kind of labor are you engaged in?
A. At the present time, night watchman at Coal mines, Engle.
4. What was your occupation in March 1905, at the time——?
A. I was laborer at the same place.
5. Did you have the same position there then?
A. No, sir, I worked day time, laboring around the mine and anything.
6. Do you remember the occasion of Mr. Melton being hurt?
A. Yes, sir.
7. Where were you at that time?
A. At the time he got hurt I was working on top of the tippie.
8. Did you know about the accident at the time?
A. Yes, sir, I knew about it; I could not help know about it; was right up there where it happened; of course I heard the fall, and heard the men hallooing and went over and looked like any body else would have done.
- 99 9. Did anything brake?
A. Yes, sir.
10. Do you know what it was?
A. The chain that had the block and pull-y hitched to the timber broke.
11. Did you see that chain after the injury?
A. Yes, sir, the chain fell when the block and pull-y fell right

in my path where I went back and forth to my work and I of course picked it up and looked at it.

12. What kind of chain was it?

A. Twisted link chain about 5-16 or 3-8 around and 2 1-2 to three feet long.

13. Had you seen any chains like it before?

A. Yes, sir, lots of them.

14. Describe the chain to the jury?

A. Gentlemen, as well as I remember the chain, it was some two and a half or three feet long and it was a twisted link chain; I guess you have seen lots of them—made of about 3-16 iron chain that is generally used as a lock chain on a wagon in a hilly country; in fact that is all the place I ever seen that nature of chain used.

(Defendant objects and moves to exclude the answer; the court excludes that part where he had seen that kind of chain used; that was the only place he had seen that kind of chain used; that is excluded.)

15. Examine that and state whether or not that is a
100 link out of that chain as near as you remember?

A. I can say that mightily resembles that particular link; it is a possibility that could be one pretty near like it.

16. Did you examine the link that was broken in the chain on the occasion mentioned?

A. Yes, sir, I took the chain up and looked at the broken end of the link.

17. Describe how that *brake* appeared at the time you examined it?

A. Ehen I took the chain up and looked at the broken link of course I looked to see whether the iron give away wholly or whether — had a flaw, and I discovered in the weld of the link, it was an old weld, was an old chain, and of course was an old weld, and was an old *brake*; it never had stuck; the weld was not thoroughly made; the weld never had stuck only probably $\frac{3}{4}$ tthe distance of the weld; about $\frac{1}{4}$ of the weld was not. While it,—the condition showed it never had been stuck together,—the chain being old, the glad in the weld was one the dirt, oil and stuff likely get in;—a chain, throw it around everywhere, and unless a man would pick it up and look at it inspect it close he would not have seen it, but if he had took the chain up and looked at it close for the purpose of seeing whether or not it had a flaw in it, he could not have helped but seen it; could not helped seeing that the weld was not a good job.

101 18. Where did that failure to weld appear?

A. You me-n whereabouts did the weld fail to stick?

19. Yes, sir.

A. Right in the end of the weld on the inside of the link, and right in the end, one end and failed to stick right on the end something about like that. (Indicating.) Of course there is a twist to it.

20. Does that link or weld as it appears there now, did it appear that same way when you examined it?

A. As well as I can remember it did; only I see on this link—

21. How about the condition as to rust then and now in the weld?

A. The rust at that time, the rusty places showed in the pores of the iron in that old flaw, but of course it did not show any rust where it had just lately come apart; but in that old brake you could plainly see the rust in the pores of the iron.

22. Is that there now?

A. You can see some evidence of it yet here, but it has been handled so much, of course you cannot tell much about that part of it, nevertheless it shows a little there now.

Cross-examination:

1. What work were you doing at the time that the chain broke?

A. I was dumping coal.

102 2. Were you on that coal chute?

A. Yes, sir, I was on that, only I was there on the other side, on top of the tipple.

3. The coal chute that was being lengthened?

A. The coal chute they were building it a new outright on the east side of the old chute where I was working on the west side.

4. How far away from the place of injury were you?

A. Right at the time the brake occurred I was some fifty or seventy feet I suppose; I was on top of the platform.

5. Were you working for the Engle Coal Company?

A. Yes, sir.

6. When you saw this link it had come apart at the weld?

A. Yes, sir.

7. State whether or not the link as it now appears has not been pressed further apart at the weld?

A. I could not tell you particular about that.

8. Does it look like it is pressed further or not?

A. I could not tell you; it has been too long for me to remember just exactly how wide it come apart; it may be a little wider now than then; it was wide enough that the other part of the chain slipped through.

9. You noticed on the end of the link where it was welded together that the welding was not properly done?

A. No, sir, it was not properly done.

103 10. You never saw this link of chain before that?

A. No, sir.

11. You do not know how it appeared from the outside?

A. What do you mean, the whole chain appeared?

12. The link how it appeared from the outside when the two pieces were pressed together, before the weld came apart?

A. No, because I did not take it up and look at it before it come apart.

13. Are you familiar with the welding of chains?

A. To this extent, I worked in an iron shop five or six years; worked iron and steel, handled a good deal of iron and steel, and seen a good deal of it worked.

14. Have you done any welding of chains?

A. I never welded a link in my life; have been a blacksmith and helped to do it.

15. Helped to weld chains?

A. Yes, sir.

16. What is your age?

A. My age is 34 years.

Redirect examination.

1. How long have you been working at the Engle Mines?

A. One year and one month at the time this accident happened.

2. Have you been there since?

A. Been working there most of the time since.

104 Also the witness J. W. HENDERSON called by plaintiff and testifies as follows:

1. What is your occupation?

A. Blacksmith and general repairer around coal mines.

2. Where are you employed at this time?

A. Evansville, Ind. Engleside Mines.

3. Where were you employed in March 1905 when Spencer Melton was injured?

A. Same place.

4. How long have you been employed there?

A. About 16 years.

5. What were your duties?

A. At the present time blacksmith and general repairer.

6. Where were you on the occasion that Mr. Spencer Melton was injured?

A. I was up on top to head around the cage at that time.

7. Do you know Mr. Will Hill?

A. Yes, sir.

8. Where was he?

A. He was out on the box where the road comes throwing coal.

9. After the injury did you see that chain that was used in that work?

105 A. Yes, sir, I saw it at dinner time awhile after he got hurt in the forenoon.

10. Did you make any examination of it?

A. Yes, sir.

11. Did you see the link that was broken?

A. Yes, sir.

12. Describe to the jury how that link appeared at that time?

A. It was a link something about three inches in kind of a twisted link, about 5-16 chain link; chain I guess about that long (indicating); long enough to reach around 8 by 8 timber, that is where they had the chain fastened; and it was a twisted chain, something like that used on these farm wagons for a lock chain; I do not know whether that was what it was made for, but something like that.

13. Where was the link broken?

A. Right in the end where the weld was.

14. Describe to the jury the appearance of that weld where it came apart?

A. It came apart right in the weld, where it is welded, right in the end; and the scurf something like on the scurf;—when go to

weld gets a little silver and stuff and makes it slick, and it appeared slick on one side, and the other side, end of the side was kinder crooked down.

15. Examine that and see if that is as near as you remember the link?

A. Yes, sir, that resembles the link.

16. Was the place showing that it was not welded on the inside or outside of the link?

A. As near as I remember seems like it was on the inside of the link.

17. Was it on the inside or outside of the bar of iron, on the outer surface or inside of the weld?

A. On the inside I should think.

18. On the inside of the chain?

A. Yes, sir, that it was not properly welded.

19. Could you see that place on it was not properly welded?

A. By fair examination you could, by picking it up and looking at it pretty close.

20. You could have seen that from the outside?

A. Yes, sir.

21. You say you are a blacksmith?

A. Yes, sir.

22. Have you had any experience in welding chains?

A. Yes, sir, I weld every now and then, make a coupling to couple these cars together; make them out of chains; make two hooks and put three links between and sometimes you make a weld——

23. What is the difference between that weld now and the way it appeared at the time he was hurt?

A. I do not see particularly any difference; there may be but I do not know of any; of course this has got kinder old now; 107 you see probably then it looked a little fresher.

24. The place where it was welded looked fresher?

A. Yes, sir.

25. Was there anything in the weld when you examined it to indicate an old brake, and if so, tell what it was?

A. Yes, sir, it seems as though right on the inside it had been cracked bent and left a little crack there that in pulling this way would not been in a twisted link; that pulling here that way would not untwist that if pulled a hard pull.

26. How could you have told that before the chain broke?

A. By taking up the chain and examining it link by link a person could have found the flaw I believe.

(Defendant objects; question and answer withdrawn by plaintiff.)

27. If it could have been discovered, state how it might have been discovered?

(Defendant objects; overruled; defendant excepts.)

(Question withdrawn by plaintiff.)

28. Could it have been discovered?

(Defendant objects; overruled; defendant excepts.)

A. Yes, sir.

29. How?

(Defendant objects, overruled, defendant excepts.)

A. By examining it link by link.

30. How could you tell after the chain had broke where the defect was?

A. By the old appearance in the crack.

108 31. What was that old appearance, how did it appear?

A. Kinder red, rusty, you know?

31. Is that rust there now?

A. Kinder; that looks kinder red, rusty, black of course.

32. Is it as red now as it was then?

A. Yes, sir, I suppose as near as I can remember it.

33. Is the part where the chain was welded as bright now as it was then?

A. No, I think not.

34. Has the appearance of the weld there been effected any way by—?

A. Right inside there of course it is not as bright now because it has been exposed to the air.

35. Has the appearance there of the weld been effected in any way by light exposure or anything of that kind?

A. Well, I do not think it has.

Cross-examination:

1. Was there anything then about this weld which is not visible now that indicates any defective condition; if so, state what it is?

A. Well, it is just the same as I said before; it looks a little cracked up; was cracked on the inside there; looked like it had been cracked to me.

109 2. Is there anything about its appearance at that time that indicated it was cracked that is not so indicated at present; if so state it to the jury?

A. No, I think not.

3. It frequently happens that welds are made on links that where the weld is defective and it is impossible to ascertain it until after the weld gives away?

A. Well, very seldom, very seldom; a person can nearly always tell that a weld is not so by examining it because that silver will get on the link and run on the iron where it is welded and you can always depend on it when it is not first class.

4. What kind of inspection does it require to ascertain that?

A. Tolerable close; take it up and look at it all around so as to see that it is caught good all around.

5. And in your judgment there can be no defective weld that is not visible from the outside?

A. Hardly ever, hardly ever.

6. Is there ever?

A. Once in a while, yes, sir.

7. How often?

A. May be ten per cent.

8. Ten per cent. of the welds?

A. Yes, sir.

9. What per cent. of the welds are defective in some particular?

A. Well, I do not know that.

10. What is your opinion?

A. Probably perhaps one-fourth of them.

110 11. Say one-fourth of the welds are defective, and then ten per cent. are not visible from the outside?

A. Yes, sir.

12. Can you say whether or not that weld was a defective weld or not?

A. Yes, sir, I believe that was; I almost know that it was a defective weld.

13. Can you say to this jury that that defective weld was visible before the brake?

A. Yes, sir, I believe it was; of course I did not examine the chain to know positive that it was; but from the appearance of it after it was broke when I examined it.

14. Tell the jury upon this, by using this link why you say it was visible before the brake?

A. Because it was a defective weld.

15. Explain to the jury why it was visible?

A. Because it was not properly welded on the inside, where in twisting it, it had kinder bent out; you see that was welded straight and then twisted; as a general thing that is the way links are done; welded straight and then twisted and when defective, will naturally open a little; if it had not been defective would have staid close up.

16. Is that your reason for saying that was visible from the outside because of the fact they are twisted after being welded?

A. Yes, sir.

111 17. That is the reason you say that?

A. Yes, sir.

Redirect:

1. What part of that weld was rusty when you examined it?

A. On the inside of the chain; on the inside of the link there.

2. But on the outside of the surface of the link?

A. Yes, sir.

3. If it had been a proper weld would it have shown that condition of rust?

A. No, sir.

4. What is the name by which this portion of the link which will be in contact when it is welded properly; by what name is that given by the blacksmith?

A. That is scurf.

5. Was there any rust at the time you took that chain up immediately after the accident on any part of that scurf?

(Objected to; overruled; defendant excepts.)

A. Yes, sir.

6. Upon what part of that scurf was that rust?

A. On the inside of the chain here.

7. What did that rust on the scurf indicate to you?

A. Indicated that it was cracked.

8. Did that indicate a fresh crack or an old crack?

A. An old crack.

112 Cross-examination:

1. This appearance of the scurf of the weld now is the same as when you first saw it except the brightness where the weld broke, is that not correct?

A. Yes, sir.

Also the witness R. H. TRIGG called by plaintiff and testifies as follows:

1. Where do you live?

A. Henderson county.

2. What is your occupation?

A. Farming.

3. How long have you been a farmer?

A. That is about all I have ever been; been at it all my life.

4. Have you had any experience in lifting heavy weights such as barn bents and other heavy timbers with pull-ys and block and tackle?

A. Yes, sir.

5. You have done that kind of work?

A. Yes, sir, we have employed a good many men and built a good many things; we built some on the farm and I superintended the job and saw to it.

113 6. In fastening block and tackle similar to this using a square timber to make the tie, what did you usually use for a tie there in which to fasten the block and tackle?

(Defendant objects, sustained; plaintiff excepts and avows the witness would answer that he invariably used a rope as the only safe means of making a hitch for the block connected with the block and tackle.)

7. I will ask you what is the usual thing used in doing that character of work? in that connection?

(Defendant objects; sustained.)

8. What is a reasonable safe thing to use in doing that character of work?

(Defendant objects, sustained; plaintiff excepts.)

9. What is the proper thing to use generally in doing that character of work?

(Objected to; the witness is excused for the present.)

Also the witness H. C. BOAZ called by plaintiff and testifies as follows:

1. What is your name, residence and occupation?

A. H. C. Boaz; residence Henderson, and I am a physician, Osteopath.

114 2. How long have you been practicing that profession?
A. Since 1900.

3. State whether or not you have made an examination of Mr. Spencer Melton's condition?

A. Yes, sir, on the 5th of February I saw Mr. Melton and yesterday.

4. Did you make an examination of his condition on both of these occasions?

A. Yes, sir.

5. Tell the jury what you found his condition to be?

A. I found in the spinal region a crushed spine from violence from some cause; that the 12th dorsal in the first lumbar vertebra was very much disturbed; seems to have been knocked out from violence of some kind; he also had the third and fourth rib broken, and a paralyzed condition from the lower extremities, loss of sensation,—was about all.

6. Did you examine the end of the spine; what did you find there?

A. The end of the spine,— If you mean the end of the spinal column—

7. The bone right down at the end of the back bone, spinal bone column?

A. No, sir.

8. You say his lower limbs have want of sensation, paralyzed?

A. Yes, sir.

9. What caused that paralysis of the lower limbs?

115 (Defendant objects; overruled; defendant excepts.)

A. The condition that his spinal column is in from the misplacement or displacement of the vertebra would cause in the region a paralysis of the lower extremities.

10. What effect would that condition have upon Mr. Melton's life; upon his future with regard to ability to labor and perform ordinary work?

(Defendant objects; sustained in that form.)

11. What effect will it have upon his capacity to perform labor, if any?

(Defendant objects; withdrawn by plaintiff.)

12. Will it have any effect upon his ability to labor?

(Defendant objects; sustained; question withdrawn by plaintiff.)

13. What effect has the injury had upon Mr. Melton?

(Defendant objects; overruled; defendant excepts.)

By the COURT: You did not know what his condition was before this accident?

A. No, sir.

By the COURT: Objection sustained.

14. Assuming that he was a normal, healthy person, in normal condition at that time, what effect would it have upon Mr. Melton?

(Defendant objects; overruled; defendant excepts.)

A. The accident would incapacitate the patient from any movement of the lower extremities, in using, in the paralyzed condition which this trouble has brought about would be unable to use his lower limbs; in other words his extremities are paralyzed.

15. Is his injury in your opinion of a temporary nature or of a permanent nature?

(Defendant objects; overruled; defendant excepts; question withdrawn by plaintiff.)

16. You have been a physician since 1900?

A. Yes, sir.

17. Are you a regular practitioner, registered under the laws of this State?

A. Yes, sir.

18. Have been since what time?

A. Since March 1904.

19. That was when the law required Osteopaths to register?

A. Yes, sir.

20. Before that how long had you been practicing?

A. Since 1900.

21. Are you a graduate of any school of Osteopathy?

A. Yes, sir. Regular Graduate of Southern School of Osteopathy, Franklin, this State.

22. In the study and practice of Osteopathy you are familiar with the human frame and the injuries to which the human frame is subject and things of that kind that any other physician would study or know in that connection?

A. Yes, sir.

117 23. State whether or not in your opinion the injuries to Mr. Melton are permanent or not?

(Objected to by defendant; overruled; defendant excepts.)

A. In my opinion the injury is permanent.

24. To what extent is it permanent?

(Objected to by defendant; overruled; defendant excepts.)

A. Throughout life.

25. Is it or not in your opinion curable by any means known to the profession?

(Defendant objects; overruled; defendant excepts.)

A. Bo curable means in my opinion.

26. Could he in the condition he is, and that you think he will remain, ever perform the duties of a carpenter?

(Defendant objects; question withdrawn by plaintiff.)

The witness R. H. TRIGG recalled by the plaintiff and testifies as follows:

1. What is a usual and proper means of making a hitch in the use of a block and tackle in raising such a bent as this illustrated on the diagram as No. 4?

(Defendant objects; sustained.)

2. Do you understand this diagram? This No. 10 is an old structure; No. 4 is a bent of a trestle in the process of being
118 raised by means of a block and tackle; No. 9 block engaged by No. 3 and attached to the beam, marked No. 2; the question is what is a usual and proper means of making a hitch in the use of a block and tackle in raising such a bent as that one?

(Defendant objects.)

3. What do you call a hitch, what is a hitch?

A. Do you mean the fastening where it — from the block to the beam?

4. That is what is called a hitch is it?

A. I do not know what they call it.

5. What is a usual and proper means of attaching a block in the use of a block and tackle in raising such a bent as that one?

(Defendant objects.)

By the COURT: Do you know what kind of a bent that was they were fixing to raise in this case; have you any personal knowledge?

A. Judging from this diagram, I would think just like——

6. Do you know anything about what was the size or weight of the bent they were about to raise in this case?

A. No, sir.

By the COURT: Objection sustained.

7. Supposing it to be in proof in this case, that this bent No. 4 was composed of a timber 22 feet long, six by eight inches;
119 another timber about four or five feet shorter of the same dimensions and a cross beam about eight and a half feet long, six by eight, and a diagonal piece three by two, green white oak, just hoisted out of the river and sawed and being raised to the straight position as a part of a coal chute or tippie by means of a block and tackle; I now ask you predicating the question upon these facts having been proven, if they have been proved that, what is a usual and proper means of making a hitch at No. 2?

(Defendant objects; sustained.)

8. Supposing it to be proved and in evidence in this case that a bent illustrated on this diagram as No. 4 consisting of a long beam 22 feet long, six by eight, and a shorter beam, four or five feet shorter with the same dimensions, and a cross beam say 8½ by six or eight and a diagonal piece illustrated here three by eight is being raised to a perpendicular position to form part of a coal chute, by means of a block and tackle; I now ask you, basing the question upon the supposition that these facts were proven, what is a usual and proper

means of making a hitch at this point No. 2 to erect the bent, or such a bent as No. 4?

(Defendant objects; overruled; defendant excepts.)

A. I should think that a good manilla rope or a good wire rope would make a fine connection.

9. What means do you use in the work of erecting similar
120 bents to that?

(Defendant objects; overruled; defendant excepts.)

(Question withdrawn by plaintiff.)

10. Would a chain of which such a link as that formed a component part even if perfectly welded be a usual or proper means of making such a hitch at that indicated at No. 2?

(Defendant objects; sustained.)

11. Why do you say that a rope is a usual and proper means of making such a hitch as that?

(Defendant objects; overruled; defendant excepts.)

A. I do that because there is more than one strand holding; it is twisted strands together and a rope will pull out and usually it gets smaller; you take a manilla rope and pulls out and a glance at it will show the strength on it by the different strands the rope is made of.

12. Is there any other reason that causes you to give that opinion?

(Defendant objects; overruled; defendant excepts.)

A. I always thought that was sufficient, I mean a good manillar rope, and with that protection with all these strands; it it was a wire rope the flaws, or could not be any flaw;—I felt that was sufficient; I never thought of anything else.

13. Did you ever use a chain in that character of work?

(Objected to; overruled; defendant excepts.)

A. I have used a chain.

121 14. Will you to the jury compare the merits of the chain and rope as used by a hitch in your experience?

(Defendant objects; sustained; plaintiff excepts.)

15. What kind of a chain did you use?

(Defendant objects; overruled; defendant excepts.)

A. I used a chain for hauling logs, large round chain.

16. What length were the links of that chain?

(Defendant objects; overruled; defendant excepts.)

17. What was the size of that chain?

(Defendant objects; overruled; defendant excepts.)

A. Something a little smaller than the size of that rod he is holding in his hand, (indicating)

18. What is the diameter of that rod?

(Defendant objects; overruled; defendant excepts.)

A. I do not know sir.

19. Did you ever use a chain containing links the size of that one?
(Indicating the broken link before the jury)

(Defendant objects; overruled; defendant excepts.)

A. No, sir.

20. Why did you not use such a chain?

(Defendant objects; overruled; defendant excepts.)

A. I could illustrate it, if you had, you might take a chain like this and twist it; then it is weak any way, and I do not pull straight; I mean it forms a leverage on itself. You can illustrate by
122 your watch chain; on this part of the chain it is dangerous to catch it that way; take it that way and pull it forms a leverage and hence will break, and some times get two links caught this way, and they will just pull apart if any flaws in it; and then it is just like bringing it around this way and when it comes together it is almost sure to break; I cannot give any reason for it but I know it to be a fact.

21. You are speaking from experience?

(Objected to; overruled; excepted to.)

A. That is my knowledge.

(Question withdrawn by the plaintiff.)

22. From what are you speaking in making that illustration?

(Objected to; overruled; defendant excepts.)

A. I am speaking from experience.

23. Experience in what line?

(Defendant objects; overruled; defendant excepts.)

A. In hauling logs and timbers; I mean in the use of chains themselves.

24. How does the use of chains compare with the use of ropes for this purpose in your business?

(Defendant objects; sustained; plaintiff excepts.)

25. What are the dangers attending the raising, if any, of such a bent as that one by means of a block and tackle with a chain hitch?

(Defendant objects; overruled; defendant excepts.)

(Question stricken out by plaintiff.)

26. What are the dangers if any attending the work of
123 raising a bent such as the one mentioned by the witnesses in this case and that I have described to you in my hypothetical question, by means of a block and tackle connected by means of a chain hitch around a square piece of timber, six by six?

(Defendant objects; overruled; defendant excepts.)

A. I think the danger would consist in that I have already explained in getting twisted, or liable to get out of any chain, flaws and things like that.

27. How will the fact that the chain is wrapped around a square piece of timber of that kind effect it, if any, in any way?

(Defendant objects; overruled; defendant excepts.)

A. If the timber is a square timber, if it should get up on it in this way, (indicating), of course the pressure on the chain, the weight would be more than likely to pull the chain down this way (indicating) and it would break.

28. How did the length of the link in the chain used by you in your business compare with the length of the link you now hold in your hand?

(Defendant objects; overruled; defendant excepts.)

29. Is a chain such as that link of which has been shown you,—composed of similar links to that one, supposing each and every link in that chain to be securely welded, a reasonably safe and proper implement or appliance to be used in making a hitch such as that mentioned by the witnesses and described by me to you in

124 my hypothetical question when lifting a bent of that sort?

(Defendant objects; overruled; defendant excepts.)

A. No, I would not think that was a safe or suitable.

30. Would you think that was a reasonably safe?

(Defendant objects; overruled; defendant excepts.)

A. Certainly not.

Also the witness W. D. COYL called by plaintiff and testifies as follows:

1. You — employed by the Rose Creek Coal Company?

A. Yes, sir.

2. In what capacity?

A. Manager.

3. Have you had any experience with the use of block and tackle in lifting heavy weights, or in the erection of bents of timber?

A. Yes, sir.

4. What experience have you had along that line?

A. We put up a tippie there about as heavy work I guess as there is in the county, that is the raising of the bents and so on.

5. I call your attention to this diagram. (Attorney explains diagram.) This is to be raised by a block and tackle; what do you call the means by which the block is attached to a beam in that sort of way at that place, (indicating), what would you call that?

125 A. Call it the hitch.

6. That is the hitch?

A. Yes, sir.

7. There is a square beam there, you notice that is attached to?

A. Yes, sir.

8. Have you had any other experience with handling weights and block and tackle?

A. I have been in the saw mill business many years, handled a good many heavy railroad timbers.

9. Did you ever lift any bents except in that tippie with block and tackle?

A. I do not know that I did; I have raised some saw mill timbers, such as that.

10. Saw mill bents?

A. Yes, sir.

11. What is the usual and proper means of making a hitch around timber, square timber in the use of block and tackle in raising such a bent as that testified to by the witnesses and such as I have described to you on that diagram?

(Defendant objects; plaintiff withdraws the question.)

By the COURT: From your experience and use of block and tackle in lifting heavy weights do you think you are acquainted
126 with the dangers, if any, incident to that procedure?

A. Yes, sir, I think I am; yes, sir.

12. What is a usual and proper means of making a hitch around a square wooden timber in the use of block and tackle in raising such a bent as that indicated on the diagram, the dimensions of which I gave you?

(Defendant objects, overruled; defendant excepts.)

A. My judgment tells me that the proper thing to use on a square timber for such work as that would be a rope.

13. Why would you use a rope?

(Defendant objects; overruled; defendant objects.)

A. With a chain on the edge of a square timber the link is liable to be there this weight would cause it to bend and would be more than liable to break the weld, I would think; a short link chain would probably not be so risky as one of longer link.

14. Would a chain composed of perfectly welded links three and one-fourth inches long and 5-16 material, such as that was before it was broke except it was perfectly welded, be a reasonably safe appliance for making a hitch to be attached to a block and tackle around six by six timber in raising such a bent as that indicated on the diagram by means of a block and tackle?

(Defendant objects; overruled; defendant excepts.)

A. I would judge not.

127 15. Will you state to the jury why not?

(Defendant objects, overruled, defendant excepts.)

A. In case this link gets on the edge of the timber, it gives it double power here to pull it loose; it has got to give; it has got to bend in some way is the reason that I would judge; when this link bends it is bound to give some way; of course the best it could be welded, it is liable to give loose at the welded point.

16. Do you know Spencer Melton?

A. No, sir.

17. Do you know anything about the facts of this case or how he received his injury?

A. No, sir, I cannot say that I do.

18. You were subpoenaed here as a witness for the defendant, were you not?

A. Yes, sir.

Cross-examination:

1. If a link of -raught iron or steel whichever it may be like that shown you was perfectly welded would not it be just as strong at the point where it is welded as at any other part of the link?

A. It is not considered so; it is a matter of impossibility to make it as strong where it is welded as where it is not; the most skillful labor in the country cannot do it.

2. Have you any experience in welding irons?

A. No, sir, I have not had but very little; I have welded some iron.

3. Then how do you know that a perfect weld is not as strong?

A. I have had experienced welders tell me so; and judging from the experience I have had; I have always seen it break at the point where it is welded 99 times out of 100 I believe.

4. How many did you ever break?

A. I do not know; I broke several; I have hauled many a saw log.

5. Have you broken as many as a hundred?

A. Yes, sir, I guess more than that.

6. How many hundred?

A. I do not know; I cannot tell just how many.

Redirect:

1. Did you ever have a chain to break while using it as a hitch on a block and tackle?

(Defendant objects; sustained; plaintiff excepts.)

129 Also the witness FRANK D. RASH called by plaintiff and testifies as follows:

1. What is your age?

A. 28.

2. How are you employed?

A. As engineer for the St. Bernard Mining Company.

3. Civil engineer, mining engineer?

A. Yes, sir.

4. Is that your profession?

A. Yes, sir.

5. Where did you receive your technical education?

A. At the Massachusetts Institution of Technology.

6. Boston?

A. Yes, sir.

7. How long have you been working in your present position?

A. Something over five years.

8. During that time have you observed the work of using blocks and tackle in lifting and loading of heavy weights and in the

erection of coal tipples and the building of coal tipples, standing up bents, etc.?

A. Yes, sir. I have observed the erection of tipples.

9. How many coal tipples has your company built in that time?

A. Three I think.

10. And you also connected as stockholder in the Victoria Company?

A. Yes, sir.

11. And consulting engineer of that Company?

A. Yes, sir.

12. Has it erected a coal tippie also in that time?

A. Yes, sir.

13. Did you take any part in directing that work?

A. Well the plans are drawn in my office and I took a part in the work in so far as interpreting the plans with the foreman of such work.

14. Your part of that work is supervision merely?

A. Yes, sir.

15. How is the strength of a chain measured or tested?

(Defendant objects; question withdrawn by plaintiff.)

16. How do you test the strength of a chain?

(Defendant objects; sustained.)

17. How is the strength of a chain determined?

(Defendant objects; sustained.)

18. Have you had any experience or was it any part of your education and experience the testing of the strength or breaking point of material?

A. Yes, sir.

19. From that experience can you say how the strength of a chain is determined; from your experience and knowledge can you say how a chain is tested and strength of it measured?

A. It would be measured—

131 By Mr. WADILL for defendant: Just answer the question whether or not you know?

A. Yes, sir.

20. How is the strength of a chain determined or measured?

(Defendant objects; sustained.)

21. Can you say from your knowledge and experience as Civil Engineer what is the work allowed of a wrought iron chain, what part of the tensile strength it should be subjected to as to work allowed?

(Defendant objects; sustained; plaintiff excepts and avows that for a strain subjected in places of one-fourth of tensile strength; for lifting weights one-sixth of tensile strength; for machinery or lifting where it is subject to jerks or charges one-sixteenth of tensile strength.)

22. What is the tensile strength of a chain?

A. Supposed to be that point at which the chain will break; the

strength to which it might be subjected without breaking, or the point at which it would break.

23. On what character of a strain?

A. That is pulling tensile.

24. Direct strain?

A. Yes, sir.

25. Is the tensile strength of a chain measured by the strain it would take to break it when it was twisted?

132 A. No, sir.

26. Will a chain that is twisted break with more difficulty than one pulling a straight direction?

(Defendant objects; withdrawn by plaintiff.)

27. Which has the greater tensile strength, a chain with straight links or one with twisted links?

(Defendant objects, overruled, defendant excepts.)

A. My answer would be an opinion there.

28. That is what we are calling for, an opinion as an expert?

A. The straight link should have a greater strength; greater tensile strength.

29. Mr. Rash, what would be the weight per cubic foot of green oak, rough sawed timber, per cubic foot?

(Defendant objects; overruled; defendant excepts.)

A. It would vary; I could not give the exact weight; some, green oak might float while other oak would sink, which of course would throw it about 62½ pounds, the weights of water, might be over or under that.

30. How much over that might it go?

(Objected to.)

31. About how many pounds a cubic *would*; give the greatest weight and last weight?

(Defendant objects; overruled; defendant excepts.)

A. I should think 60 to 70 pounds.

133 32. Mr. Rash, what proportion of the relative tensile strength of a rough iron given, with given dimensions is a reasonably safe working load for such chain?

(Defendant objects; overruled, defendant excepts.)

A. Conservative proportion I should think would be one fifth or one sixth of the total strength.

33. Suppose the chain is subjected in the process of hoisting timbers or bent of any approach or coal tippie to a jerking or heavy motion, then what proportion of the tensile strength of that chain would be a reasonably safe working load?

(Defendant objects; sustained.)

By the COURT: In consultation with attorneys upon the correctness of the court's ruling in refusing to allow this witness to testify how to ascertain the tensile strength of a chain the Court with-

drew its rulings and announced that it would permit the witness to answer, and overruled the defendant's objection, to which the defendant excepts.

34. Take the timbers in that bent as one 21 feet long six by eight inches, the long piece; short piece six by eight inches 12½ feet long; a diagonal piece eight by 3½ inches 17 feet nine inches long; a cross beam six by six inches, eight feet three inches long and one smaller piece spiked on here that does not appear on that diagram; that piece being eight by three inches, one foot nine inches long; and take the timber as being green oak timber; so green that when you hit it with a hammer the sap would splash out in your face; I ask you if you have made any calculation on that basis as
134 to say what that bent would weigh according to the method of arriving at it?

(Defendant objects.)

35. Say just green oak timber, leaving that part out of it about the sap flying from it, just green oak timber what would be the average weight of timber of that kind?

(Defendant objects; overruled; defendant accepts; question withdrawn by plaintiff.)

36. Assuming that the timbers in that bent of oak; one piece is six by eight inches 21 feet long; the other piece six by eight inches 12½ feet long; the cross beam is six by six inches eight feet three inches long; the diagonal piece is eight by 3½ inches, 17 feet 9 inches long; and one small piece eight by three inches, one foot nine inches long; and that the timbers are all green oak what would a bent of that character weigh?

(Defendant objects; overruled; defendant excepts.)

A. About eleven or twelve hundred pounds a bent of such dimensions.

37. Have you made a calculation or can you state the usual tensile strength of a 5-16 inch chain, used in the, tensile strength of a 5-16 inch link?

(Defendant objects; overruled; defendant objects.)

A. No, sir, not 5-16.

38. Have you made in on the basis of a ¾ inch chain?

A. Yes, sir.

135 39. Would the tensile strength of a 5-16 inch chain be more or less than a ¾ inch chain?

(Defendant objects; overruled; defendant excepts.)

40. Which would have the most tensile strength a 5-16 inch chain or a ¾ inch chain?

(Defendant objects; overruled; defendant excepts.)

A. ¾ inch chain should have.

41 The most of less?

A. The most.

42. What would be the ordinary tensile strength of $\frac{3}{8}$ inch chain?

(Defendant objects; overruled; defendant excepts.)

A. As I remember; I have forgotten just exactly what that was. I could figure it again.

43. Say you do not remember?

A. I do not remember.

44. Do you remember about the amount?

(Defendant objects; overruled; defendant excepts.)

A. There are several figures so I would not say.

45. What did you say was in that character of work lifting a bent of that kind what is recognized as the usual reasonably safe proportion of the tensile strength that ought to be—?

A. I would consider 1-1 of the tensile strength.

46. In lifting a bent of that kind say the block is attached to the chain being around that beam shown at No. 2 and block hooked into that chain at No. 3 on the diagram, the portion of the weight of the bent or strain would be on the chain would it not?

136 (Defendant objects; question withdrawn by the plaintiff.)

47. Is there anything besides the weight of the bent and strain on that chain in lifting it in that position shown in the diagram, and if so what?

(Defendant objects; overruled; defendant excepts.)

A. There might be; there might be some protection or there may be something holding at the foot of the bent.

48. How much power does it take to lift a weight of 1200 pounds?

(Objected to; sustained.)

49. What proportion of the weight of a bent of that kind being lifted, how much power will it take to lift a bent of that kind, say, on the hypothesis that the bent weights 1200 pounds and on the ground?

(Defendant objects; overruled; defendant excepts.)

A. I could not answer that not knowing the way the bent was distributed or degree of the pull; that is on an angle pull, that would vary it.

50. How does the angle pull effect it?

(Defendant objects; overruled; defendant excepts.)

A. You mean whether greater or less?

51. Yes, sir.

A. The easiest way to pull would be at right angles; of course when on the ground pull straight up and then if you could pull at a right angle pull throughout, you would have the easiest way.

52. Would the strain on the chain there be greater or less if the angle pull right from here was the same as the angle there?

137 (Objected to; question withdrawn.)

53. No. 9 there are ropes leading from the bent No. 4 to the block No. 3; would the strain on the chain be greater if the pulley rope marked no 11 were at the same angle as the rope marked No. 9?

(Defendant objects; sustained.)

54. Given the weight that is being lifted there, how would you ascertain the power necessary to lift that weight?

(Objected to; overruled; defendant excepts.)

55. Given the weight on the rope there how would you ascertain the power necessary to lift the bent?

(Defendant objects; sustained.)

By the COURT: Is the weight the same on that rope all the time from the time that bent leaves the ground until it gets straight?

A. No, sir.

Also the witness COLUMBUS ASHBY called by plaintiff and testifies as follows:

1. What is your age?

A. 48.

2. What is your trade?

A. Contractor, kind of a house builder.

3. Have you ever had any experience in the raising of timbers and bents in the process of building structures by the use of
138 block and tackle?

A. Yes, sir, a little not extensively.

4. What structures have you built?

A. I have built tobacco factories, a few; and I have helped—

5. Ever built any coal tipples?

A. Never raised any; have framed them.

6. Have you seen them raised, worked on them when being raised?

A. No, sir, not on the tippie; I have raised the timber of heavy frame that we put up piece at a time.

7. Do you think that you are able to—that you know the proper methods of handling a block and tackle in raising buildings and raising structures or bents or anything of that sort composed of heavy timbers?

(Defendant objects; overruled; defendant excepts.)

A. I think I know how to fix hitches on; how to hitch to it, to pull it up.

8. You say you are acquainted with that and know that?

(Defendant objects; question withdrawn by plaintiff.)

9. I will ask you what is a usual and proper means of making a hitch in the use of a block and tackle in raising a bent or trestle or tippie illustrated here on the diagram as No. 4 composed of timber 22 feet long, six by eight, and another timber some shorter, six

by eight, and a cross timber eight and a half feet long, and diagonal timber in here three by eight, to a perpendicular position by means of a block and tackle running from a permanent structure out to the bent to be raised?

(Defendant objects.)

By the COURT: From your observation and experience in such matters do you think you are acquainted with the usual and customary way of making the hitch for the upper block?

A. I do not know whether I am acquainted with the usual way or not; I know how I do it. I do not know whether or not that is the usual way.

10. Have you had experience similar to this described to you here?

A. No, sir, I have never had any heavy weights of that kind.

By the COURT: This witness is not competent to testify on that question.

Also the witness W. A. TOOMBS called by plaintiff and testifies as follows:

1. What is your business?

A. I am foreman of the St. Bernard at Earlington in construction and building.

2. Foreman of the constructing and building of the St. Bernard Mining Company at Earlington?

A. Yes, sir.

3. How long have you been in that work?

A. I have been with the Company more than twenty years.

140 4. How long have you been foreman of construction?

A. Since somewhere in the early 90's, '92 or '93.

5. What experience have you had in the erection of coal tipples or in the erection of places involving the use of block and tackle for the raising of bents?

A. That is my experience; I put up coal tipples and put in railroad scales and raised heavy buildings; nearly all of my work is heavy carpentry.

6. What coal tipples have you built?

A. Put up one at St. Charles and one at Morton's Gap and two at Barnsley and one at Victoria.

7. Have you ever built any Coak—

A. Yes, sir.

8. That work involve the raising of bents?

A. Yes, sir, heaviest I ever was in.

9. Have you done work in the maintaining of other buildings and repairing, similar work?

A. Yes, sir.

10. Do you think you from your experience and observation you are qualified to testify concerning the proper method of adjusting and using block and tackle in that character of work?

A. I should think so.

11. Is the use of a block and tackle a work requiring experience and skill?

(Defendant objects; overruled; defendant excepts.)

A. Yes, sir, it is a work requiring judgment and skill.

141 12. This diagram represents, No. 10, an old structure or coal tippie used for coaling engines; bent 7 and 8 new one going up; here is bent at 4 being raised by means of block and tackle, two pullies No 9; block at 3 *abd* chain hooked at 2; the line comes down at 11 and five men here; do you understand that diagram?

A. Yes, sir.

13. This timber is 22 feet long, eight by six; this one some shorter, same dimensions; this one eight and a half feet long, same dimensions; this diagonal piece perhaps less. I will ask you to describe to the jury a usual and proper means of adjusting block and tackle and in performing that operation into a perpendicular position to be made a part of that structure?

(Defendant objects; overruled; defendant excepts.)

A. If I was going to raise this bent I would place this block you see right here down at this point I would reverse this block as you see; I would place block 3 at 4; of course this would be putting No. 4 at the place of No. 3; there is a dead block down here somewhere at the bottom of pull-y line 11, and let the pull-y line come over that block and would not pull directly down and pass off at another angle and pull obliquely down that way; get twice the power they could get from this arrangement.

14. Which arrangement, the one you have given or the one that you see there would make the greatest strain upon this chain hitches at 2?

142 (Defendant objects; sustained.)

15. If this pull-y line 11 went off at an angle greater than it now goes off at would that increase or decrease the strain upon the chain hitched at 2?

(Objected to; overruled; defendant excepts.)

A. That would diminish the strain on this chain.

16. Why would it do that?

(Defendant objects; overruled; defendant excepts.)

A. Simply because the less you deflect a rope from a straight line the less strain there is upon the pulley through which it works; for that reason lifting off here obliquely will not have as great a strain on that chain as if you come down perpendicular, or back at a greater angle.

17. Suppose a chain 5-16 of an inch in diameter, the link 5-16 around, $3\frac{1}{4}$ inches long, such a chain as the size of this one, and perfectly welded would that be a proper chain to use in making a hitch around a square timber;—would that be a usual and proper

means of making a hitch around a square timber in use by block and tackle in raising such a bent as that I have described?

(Defendant objects; sustained.)

18. Would a chain with links $3\frac{1}{4}$ inches in length 5-16 inches-raught iron with perfect weld be a reasonably safe appliance to use in making a hitch around a square timber six by six to which to attach a block and tackle to raise the bent indicated on this diagram, the dimensions of which I have given you?

(Defendant objects; overruled; defendant excepts.)

A. A chain of links the size of that if they were short would be safe and I would not hesitate to use it, but I would not use a chain where the links were like—

By the COURT: The question is, would it be reasonably safe?

(Defendant objects; overruled; defendant excepts.)

A. I would think not.

19. Why would you not consider that a reasonably safe hitch?

(Defendant objects; overruled; defendant excepts.)

A. The link is liable to get caught right over the angle of the timber that way and greater strain be imposed on that link than necessary to raise the structure; you might get two or three times more strain on the chain by obtaining the link over the corner than if a short link chain; that is the reason I do not use long chains.

20. In raising a bent such as the one I gave you the dimensions of, and such as indicated on this plat, by means of block and pulley, is it a reasonably safe means to use in raising that bent to a perpendicular position to use an irregular pull or heave to the accompaniment of a heaving song?

(Defendant objects.)

21. Suppose it to be testified in this case that these five men at once had hold of this rope No. 11 going around the dead pulley and raising that bent described by me to you indicated on that drawing and were pulling that rope, he, ha,—he, ha; would that be a reasonably safe means of raising that bent to a perpendicular position?

(Defendant objects; sustained.)

22. Supposing that it be demonstrated by the testimony of witnesses to the satisfaction of the jury, not a reasonable doubt;—suppose it be treated as true that this bent of dimensions which I have given you to-day as indicated on that drawing is being raised by means of block and fall indicated as No. 9, by the five men at No. 1, pulling rope at No. 11, going around the dead pulley and being propped at the back by the men at 5 and 6 with "June" pole, and by the men at 1, five men at 1, pulling that rope 11, he, ha, he, ha, and ready heaves, would that be a reasonably safe method of doing that work.

(Defendant objects; overruled; defendant excepts.)

A. I should not consider it a safe way to raise the bent.

22. Would you consider it a reasonably safe way?

(Defendant objects; overruled; defendant excepts.)

A. I should not consider it a reasonably safe way.

23. Why not?

(Defendant objects, overruled; defendant excepts.)

A. On account of the irregular heaving, that would be liable to break something which a steady pull would not break.

145 24. What is a usual and proper way of pulling that bent into position by means of block and tackle?

(Defendant objects.)

25. In the appliance of the power?

(Defendant objects; overruled; defendant excepts.)

A. As I said a while ago.

26. How was that?

(Defendant objects; sustained.)

27. What is a usual and proper means of applying the pull or power in the use of a block and tackle in raising such a bent as that I have indicated to you in the manner in which the ropes are adjusted at the place these five men are pulling down on No. 1?

(Defendant objects; overruled; defendant excepts.)

A. I always apply the power with either a cap stand or a grab; pull this rope with a cap stand or grab; that is a steady continuous pull; that is the way I apply the power; I do not say how other people apply it.

28. Does that cap stand or grab give a steady or jerking movement?

(Defendant objects; overruled; defendant excepts.)

A. It is a steady, continuous application of power.

29. In the operation described in this sketch would it be a reasonably safe mean- of doing that work to have this bent No. 4 as it rose into a perpendicular position propped by june poles by these men at 5 and 6?

146 Defendant objects; overruled; defendant excepts.)

A. I have never raised a bent in all my life where I required men to get in and prop it; I always had everything safe before I started and made every man stand out of a possibility of danger.

30. Do you consider that a reasonably save means of doing that work?

(Defendant objects; overruled; defendant excepts.)

A. I considered it a very dangerous means.

Cross-examination:

1. You have no objection to the use of a chain at No. 2 if the links are short enough?

A. If it is a short link chain of sufficient size or strength I use that more than I do a rope.

2. You use the chain to make the hitch more than you do the rope?

A. I do, yes, sir.

Redirect:

1. What sort of chain do you use, like this?

(Defendant objects; sustained.)

A. Never have yet.

2. Describe these short link chains that you use?

(Objected to; overruled; defendant excepts.)

147 A. The links are of $\frac{3}{8}$ iron, and they are so short that you cannot put a half inch pulley between the link; and should a link get caught on the angle that way, and cannot get strain on it to break it. It is a very short link and closely made.

3. How are these chains coupled, these short link chains?

(Defendant objects; overruled; defendant excepts.)

A. We get a barrel full at the time of great long lengths, and cut them off, and I get a blacksmith to put a ring in one end and a hook in the other; that hook is made of a piece of $\frac{3}{4}$ square steel bent into a hook diagonally across the square, so as just to hook in between the links; crosses not inside of the links, but strikes the link and the hook is long enough to reach clear across the whole length of the chain, and I do not believe I ever knew one to slip on earth; they don't slip.

4. What character of chains are these short link chains that you use?

(Defendant objects; overruled; defendant excepts; plaintiff withdraws the question.)

5. Are these chains tested or untested chains?

(Defendant objects; sustained.)

6. Did you ever use in your work a chain which is not tested?

(Defendant objects, sustained.)

7. Is it a reasonably safe means of making a hitch around a square timber to use an untested chain?

(Defendant objects; sustained.)

148 8. A chain with a link that long (indicating), is that proper to use in any case in making a hitch around a square timber?

(Defendant objects; sustained.)

9. What method do you employ to ascertain the strength of a wrought iron chain?

(Defendant objects.)

10. Such as this one might be?

(Objected to; overruled; defendant excepts.)

A. I test them; I never use a chain except I have previously tested it with something equally as heavy as I am going to use it for at that time; I use a chain that I have previously used.

11. How do you test them?

(Defendant objects; overruled; defendant excepts.)

12. What means do you use of testing them?

(Defendant objects; overruled; defendant excepts.)

A. Some times I will take a heavy stick of timber and place one end on a pillow and put a chain around it and fasten and then place a jack screw at this end, and that jack screw is operated by one or two men pulling on it; I have never broke one of my chains that I risk in a structure.

13. The question was how did you test them?

A. That is the only means; just by some great strain previously that I tried.

14. Is the strength of a chain in its weakest or strongest link?

(Defendant objects; overruled; defendant excepts.)

A. The weakest link in the chain constitutes the true strength of that chain; the weakest link.

149 Also the witness L. H. PAGE called by plaintiff and testifies as follows:

1. What is your occupation?

A. Carpenter.

2. What character of carpenter work do you do?

A. Heavy frame work principally for the last few years.

3. Have you had any experience as railroad bridge carpenter?

A. Yes, sir, worked two spells as bridge carpenter on the I. & N. some time ago.

4. Have you ever constructed any coal tipples?

A. Yes, sir.

5. Or erected any fram- works of that kind?

A. Yes, sir.

6. Name the coal tipples you have built?

A. I built the first tipple at Barnsley; built one at the Victoria; I built one at Oak Hill; one out here at the Royal Mines.

7. Built one for King & Coil Company?

A. Yes, sir.

8. Built one for — in Hanson?

A. Yes, sir.

9. Built one in Boyle County, Ky.?

A. Yes, sir.

150 10. Built one for Rose Creek Coal Company?

A. I worked some on that.

11. Ever built any trestles, tram roads or railroads involving the means of raising bents by block and tackle?

A. Yes, sir.

12. Ever do any work on railroad by raising approach work by block and tackle?

A. Yes, sir, the work I did did not use block and tackle, used str-ight rope; did not use block and tackle at that time.

13. What is a usual and proper means of making a hitch around a square timber in the use of block and tackle in raising a bent of a coal chute or tippie such as is indicated on this diagram by No. 4, the same being composed of a timber 22 feet long, eight by six and a shorter timber the same dimentions, and a cross beam $8\frac{1}{2}$ feet long and six by eight; and a diagonal timber three by eight?

(Defendant objects; overruled; defendant excepts.)

A. You mean what is proper to use for a sling around these timbers?

14. Yes, sir. Such as this indicated at 2?

(Defendant objects; overruled; defendant excepts.)

A. I always used a rope.

15. Why did you use a rope?

(Defendant objects; overruled; defendant excepts.)

A. Because I considered it safe.

151 16. Would you consider a wrought iron chain with $\frac{5}{16}$ inch link links $3\frac{1}{4}$ inches long, perfectly welded a reasonably safe appliance for the purpose of making a hitch around this square timber as indicated at No. 2?

(Defendant objects; overruled; defendant excepts.)

To raise a bent such as that I have described?

(Defendant objects; overruled; defendant excepts.)

A. No, sir.

17. Why would you not?

(Defendant objects; overruled; defendant excepts.)

A. A chain is liable to get twisted a little and throw too much strain on one certain part of the chain.

18. Then what happens?

(Defendant objects; overruled; defendant excepts.)

A. When ever it does that it is liable to break.

Cross-examination:

1. Would you regard a short link chain as a proper appliance for that?

A. I would think it would be safer than a long link chain likely; of course would be more room for a twist without such a strain.

Redirect:

1. Measure that chain and state what the diameter is
152 (hands the witness the link in evidence).

(Defendant objects; overruled; defendant excepts.)

A. That is about five and a half sixteenths; may be I got up on the weld a little; (Witness measures again) five sixteenths.

2. Measure the length of it?

(Defendant objects; overruled; defendant excepts.)

A. Three inches.

Also the witness THOMAS MARTIN called by plaintiff and testifies as follows:

1. What is your age?

A. 65.

2. What is your occupation?

A. Carpenter and builder,

3. In your business as carpenter and builder have you ever had occasion to use and have you used a block and tackle in the erection of bents or frames?

A. Yes, sir.

4. In heavy timbers?

A. Yes, sir.

5. How long have you been engaged in that character of work?

A. Solely for about 15 years; more or less all my life.

153 6. Are you qualified to speak as an expert, the proper and usual methods of applying and using block and tackle in the raising of such structures?

(Defendant objects; sustained.)

7. From your observation and experience are you acquainted with the proper and usual means of applying and using a block and tackle in the erection of such a structure as this indicated on this drawing, being a coal chute composed of bents like this one and being raised at No. 4; this timber being 22 feet long, eight by six, then a little shorter eight by six; this timber here going cross ways 8½ feet, eight by six; are you acquainted with the use of block and tackle in raising such structures with timbers as that?

(Defendant objects; overruled; defendant excepts.)

A. I have had a good deal of experience with that work, railroad trestles.

8. What is a usual and proper means of making a hitch or sling in the use of block and tackle in raising such a bent as this indicated at No. 4, the dimensions of which I have given you, by means of block and fall at No. 9, the sling to be attached at No. 2 around a square piece of timber six by six?

(Defendant objects; overruled; defendant excepts.)

A. My preference always was a rope; I always thought it safer, a rope sling.

9. You were subpoenaed here as a witness for the defendant, I believe?

A. I do not know about that.

154 10. Here is the subpoena, the sheriff served this subpoena on you?

A. He did not.

11. That is your name there marked with a cross?

(Defendant objects; sustained.)

A. Did you mean a subpoena as a witness?

12. Yes, sir.

A. I have not received any subpoena.

13. You were excused from the jury in this case because you were summoned as one of the defendant's witnesses?

(Defendant objects; sustained.)

14. Do you know Spencer Melton?

A. I just know him; have no personal acquaintance.

15. Do you know anything about the facts in this case?

A. Nothing whatever.

Also the witness FRANK D. NASH recalled by plaintiff and testifies as follows:

1. Have you figured the tensile strength of a 5-16 wrought iron chain?

A. I figured a 3-8.

2. What is the tensile strength of the ordinary 3-8 inch wrought iron chain?

(Defendant objects; overruled; defendant excepts.)

A. It would be five to six thousand pounds.

155 3. What is the safe working load in work of the character that was shown on that diagram?

(Defendant objects; overruled; defendant excepts.)

A. It would be one-fifth to one-sixth of that amount.

4. How much less would that be if it were five-sixteenths instead of 3-8?

(Defendant objects; overruled; defendant excepts.)

A. I could not say; it would just be as much less as the difference between the sections; what I mean by the sections of the chain; that is the area of the iron of which the link was made.

5. 1-16 is the difference in size?

A. There would not be a great difference.

6. Would it be practically 1-16 less?

(Defendant objects; overruled; defendant excepts.)

A. No, it would not be 1-16.

7. Can you say about what it would be?

(Defendant objects; overruled; defendant excepts.)

A. I could get at it by figuring. (Witness figures.) Roughly and hurriedly the section of a 5-16 inch link would be 7-100 nearly 8-100 of an inch; while a section of the other would be a little in excess of 1-10 of an inch, and would be that difference, and of course tensile strength depends on that section, so much per square inch.

8. It would be about in the proportion of eight to ten?

(Defendant objects; overruled; defendant excepts.)

156 A. Yes, sir.

9. Is your estimate that you have given based on new or old material?

(Defendant objects; overruled; defendant excepts.)

A. That is based on new material, a perfect chain; it is not taking into consideration any flaw in the material; just solid material.

Cross-examination:

1. You say one is 8-100 and the other 10-100?

A. I said roughly unless there is some error in it.

2. That is 2-100 difference?

A. Yes, sir.

Also the witness R. W. BRYANT called by plaintiff and testified as follows:

1. What is your age?

A. I am 62.

2. What is your occupation?

A. Carpenter.

3. How long have you been engaged in that character of work?

A. Off and on since I was about 30 years old.

4. Have you had any experience in the lifting of frame work or bents of frame timbers by means of a block and tackle, such work as is indicated on this plat here;—here is an old structure at 10; here is a new work going up, these bents 7 and 8 already erected and here is bent at 4 being raised by block and fall at 9, hitched around a square timber at 2 and fall by pulley at 11; have you ever had any experience with raising any such work as that with block and tackle?

A. Yes, sir.

5. From your knowledge and experience in that work can you tell what is the proper and usual way to perform that work with the application of the block and tackle?

(Defendant objects.)

By the COURT: What experience have you had in that line?

A. I have raised some tolerable heavy factories, tobacco factories and county bridges.

6. Have you ever had any other experience in the use of block and tackle?

A. Not especially in raising timbers; while I was in the navy service had use for them every day almost.

7. On board a ship?

A. Yes, sir.

8. What is a usual and proper means of making a sling or hitch at this point 2 to raise this bent to a perpendicular position by means of this block and tackle, the bent being 22 feet long, six by
158 eight, the longest timber; this next timber No. 4 being shorter; this being a piece 8 1-2 feet long, six by eight and this diagonal piece three by eight, made out of oak timber, sawed; the tie at No. 2 being around a square piece six by six?

(Defendant objects; overruled; defendant excepts.)

A. I usually hitch with a sling made of rope.

9. Why do you use a rope?

(Defendant objects; overruled; defendant excepts.)

A. I do not think that a chain would be safe.

10. Why do you not think a chain would be safe, or reasonably safe?

(Defendant objects; sustained.)

11. You were summoned as a witness for the defendant in this case, were you not?

A. Yes, sir.

12. Do you know Spencer Melton?

A. I just seen him out on the streets.

13. Do you know anything about how he got hurt, or the facts in this case?

A. Not personally, no.

Also the witness J. H. SHANKS called by plaintiff and testifies as follows:

1. You are a carpetner, contractor and build by contract?

159 A. Yes, sir.

2. How long have you followed that character of work?

A. 20 years.

3. In the course of your work and trade have you had occasion to use and have you used block and tackle in the erection of heavy bents of frames and timbers?

A. Yes, sir.

4. Have you such knowledge or experience in the use of block and tackle as will enable you to give an opinion as to the proper method of applying block and tackle in the raising of bents indicated at No. 4 on this plat to a perpendicular position by means of a block and fall indicated as No. 9 attached to the cling at No. 2?

(Defendant objects; sustained.)

5. What experience have you had in raising bents of timbers? with block and tackle?

A. It is all right except this part right by the——

(Objected.)

6. What experience have you had?

A. I have raised a good many big timbers; I never raised a bent just like that; I have raised a big post thirty feet high.

7. What other things have you raised besides a post?

A. I have raised heavy height beams, something like 16 inch beam, 25 feet long.

8. Use block and tackle for that purpose?

A. Yes, sir.

160 9. With similar——?

A. Not exactly; that is straight up but down pull; we have a pulley like this and use at the top of the pulley and raise the beam right straight up this way, but I have pulled timbers like that.

10. Have you had such experience as would enable you to say what would be the proper way of applying block and tackle in raising a bent like No. 4 as explained to you heretofore?

(Defendant objects; sustained.)

By the COURT: Throughout your 20 years of carpentry have you had occasion frequently to use block and tackle for the purpose of raising these heavy weights and timbers?

A. Yes, sir.

11. What is a usual and customary and proper means of attaching block to a square beam say six by six situated as No. 2 in this diagram?

(Defendant objects; overruled; defendant excepts.)

A. In fastening a rope or chain either one on a square piece of timber with chain, put in a bush here and not let the chain go square around the timber, because the chain won't fit square around; the corners to the timber will cut the rope; but we put in a piece in between there to make it kinder round.

12. Which is preferable, ch-in or rope at that point?

(Defendant objects; overruled; defendant excepts.)

13. Which is preferable for the purpose of attaching that chain at No. 2, chain or rope?

(Defendant object-; overruled; defendant excepts.)

By the COURT: So far as your own affairs are concerned?

A. If I was going to raise this timber what would I put there to fasten this timber to?

(Defendant objects; overruled; defendant excepts.)

14. Yes, sir.

(Defendant objects; overruled; defendant excepts.)

A. I would put a heavy rope there if I wanted it to stay there.

(Defendant objects; overruled; excepts.)

15. What would be the effect of using a chain such as that with links 3 1-4 inches long, 5-16 chain wrapped around six by six timber that place?

(Defendant objects; sustained.)

16. You are one of the defendant's witnesses, summoned here as a witness by the defendant?

A. Yes, sir.

17. Do you know Spencer Melton?

A. Yes, sir.

18. Do you know anything about the facts of this case, how he got hurt?

A. No, sir, I do not.

(At this point court adjourned to Monday morning November 5, 1906. Met pursuant to adjournment.)

162 Also the witness Dr. W. S. Ross called by plaintiff and testifies as follows:

1. You a practicing physician?

A. Yes, sir.

2. How long have you been practicing?

A. About 48 years.

3. You a registered physician and surgeon?

A. Yes, sir.

4. A graduate of any school?

A. Yes, sir.

5. What school?

A. Eclectical Medical Institute of Cincinnati, Ohio.

6. Are you acquainted with Mr. Spencer Melton?

A. Yes, sir.

7. Have you been treating him any since he was injured?

A. Yes, sir.

8. For how long a time?

A. Since the latter part of August.

9. 1905 or 1906?

A. 1905.

10. Have you ever made a close examination of the injuries and his condition?

A. Yes, sir.

11. State to the jury when that examination was made and what you found?

A. I had seen him once or twice before I made this thorough examination; I did not know then I was wanted for a witness but after that I had him taken into my office and tested him with the — electricity; and you want to know what I found?

12. Yes, sir.

(Defendant objects to what he found.)

By the COURT: At what date was that?

A. I think that was September the 5th.

By the COURT: What year?

A. 1905, I could tell positively by examining.

(Defendant objects; overruled; defendant excepts.)

I put him on the stool and applied electricity; I found on his back,

the small of the back,—the processes were a little larger than the others; probably one or two of the vertebra seemed to be a little larger, as if had been a heavy blow upon him; and the electricity found that produced a considerable pain; but below that no pain; there was no contraction of the muscle showing that it was paralyzed from that down, especially on the right side; for instance his right leg he scarcely had any sensibility whatever, and you might say paralyzed; the left leg not so much as the right.

13. Did that have any other effect upon him besides paralysis of the limbs?

((Defendant objects; overruled; defendant excepts.))

164 A. I found the muscles of the rectum paralyzed and also the bladder; great difficulty in passing urine; I examined the urine and found it very thick; it was thick muddy; that frequently forms stone in the bladder.

14. What caused in your opinion, if you can state, what caused the condition you found Mr. Melton in?

((Defendant objects; overruled; defendant excepts.))

A. I think it was from a heavy blow upon the spine; concussion of the spine caused it.

15. Have you been treating Mr. Melton since that examination?

A. Off and on I have.

16. What change if any has taken place in his general condition since that time that you can discover?

A. I have examined him several times and he complained of being very weak, and I examined his pulse and at times there was no pulse at the wrist showing that he was very weak and he required a stimulant.

17. What are the nature of his injuries in regard to permanency; are they permanent or not?

((Defendant objects; overruled; defendant excepts.))

A. I find the muscles of the right leg very flabby and soft; the left one not so much so as the right; and I also find scars or bed sores on his back; lower part of his back, from lying in one position so long.

18. The injuries to Mr. Melton, are they permanent or not? In your opinion?

((Defendant objects; overruled; defendant excepts.))

A. It is my opinion that it is permanent.

165 19. Are his injuries or not in your opinion curable?

((Defendant objects; overruled; defendant excepts.))

A. My opinion is that it is permanent.

20. State whether or not in your opinion he will be able to perform any physical labor of any kind?

((Defendant objects; overruled; defendant excepts.))

A. I do not think he will be able to walk.

21. Never be able to walk you say?

A. That is my opinion.

22. Will he ever be able to stand erect?

(Defendant objects; overruled; defendant excepts.)

A. I think not without crutches.

Also the witness Dr. G. W. PARKER called for plaintiff and testifies as follows:

1. What is your occupation or profession?

A. Osteopath.

2. How long have you been practicing that profession?

A. Since 1901, June.

3. Are you or not a graduate of any school of Osteopathy?

A. Yes, sir.

4. What school?

A. Southern School, Franklin, Kentucky.

5. Are you a registered Osteopath?

A. Yes, sir.

6. Practice under the laws of the State?

A. Yes, sir.

166 7. Are you acquainted with Mr. Spencer Melton?

A. Yes, sir.

8. State whether or not he has been under your treatment recently, if so, how long?

A. He commenced treatment on the 10th of August 1905 and has been up to the present.

9. What have you been treating him for?

A. Treating him for a displacement in the spinal column or in the backbone and also a fractured condition there and forward condition in the lower part of the spine, and a sore that he had on the back of his head, and kidney and liver disturbance.

10. During that time have you had occasion to make any examination of his body?

A. Yes, sir.

11. State what you found on these examinations.

(Defendant objects; overruled, defendant excepts; question withdrawn by the plaintiff.)

12. As an Osteopath are you familiar with the human anatomy?

A. Yes, sir.

13. A part of your studies?

A. Yes, sir.

14. Have you had occasion to practice cases of broken bones and injuries of that character to the human anatomy?

A. Yes, sir.

167 15. And that is a part of your course of study in your school of Osteopathy?

A. Almost altogether, yes, sir.

16. You qualified and capable of recognizing its conditions when you find them in the subject under consideration?

A. Yes, sir.

17. I will get you to state what condition you found Mr. Melton in on the examinations you have made?

(Defendant objects; overruled; defendant excepts.)

A. You mean when I first met him?

18. During the time he has been under your care and treatment?

A. You want me to express this so it will be understood?

19. Yes, sir.

A. There are two vertebræ in his spine or backbone that are the seat,—became the seat of the entire trouble, and that is the 12th dorsal and first lumbar; and that has been crushed backward, or driven backward; how much fracture, or just to what extent the fractured condition is there I do not know; I do not think anybody can tell; but there is so much injury there that it has cut off almost entirely the sensation and motion of the lower limbs; then I found a fracture of the lower bone of the hips; it is the termination of the spinal column, the last bone, the coc-yx; and found a large sore about two and a half inches in diameter on the hips behind; had been
168 there about four months; and then an excess of triple phosphate in the urine, which was tested in acid, and I found one little gravel about the size of a pea that had got past through give him that pain, and then there were innumerable little gravel that passed from time to time in the urine; then there was an injured condition of the lower part of the back produced from the excess of spine displacement of the first lumbar and 12th dorsal vertebræ; there are some vertebræ below that that are wrong.

20. What condition did you find the lower limbs in?

A. Almost entirely paralyzed, without sensation and without motion.

21. Could you tell whether the spinal cord was affected or not?

A. Yes, sir; I think so.

22. Has there been any appreciable improvement in his condition since he has been under your treatment?

A. Some sensation has come to the right limb and some motion to the right limb; in an effort he can lift the right leg over the left, but he has never been able to lift the left.

23. Has that improvement continued?

A. It continued up to about the first of last January, about that time.

24. Has there been in your opinion any improvement in his condition since that time?

A. No, sir.

169 25. State whether or not in your opinion his condition is permanent?

(Defendant objects; question withdrawn by plaintiff.)

26. What caused the condition that you found to exist in your opinion?

(Defendant objects; overruled; defendant excepts.)

A. It was some violence; some violence that produced it.

27. Personally you know nothing about the character of the blow that he received, if he did receive any?

A. No, sir, only just from what I heard.

28. What in your opinion will be the duration of his injuries?

(Defendant objects; overruled; defendant excepts.).

A. I believe it is permanent.

29. Is there any way in your opinion to cure him?

(Defendant objects; overruled; defendant excepts.)

A. No, sir.

30. You mentioned some kidney and bowel trouble, liver troubles perhaps, what was the cause of that condition?

(Defendant objects; overruled; defendant excepts.)

A. It was from a disturbance to the nerve supply from the spinal cord from the injury.

31. Caused from the injury?

A. Yes, sir.

32. How are his genative organs affected; if at all, by reason of the injury?

170 (Defendant objects; overruled; defendant excepts.)

A. There seems to be complete paralysis.

Cross-examination:

1. Has there been a general improvement in his condition since his injuries?

A. Not since along about the first of the year, in the condition of his lower limbs, sexual organs, bowels and bladder.

2. He goes about continually, is not that true?

A. In his chair you mean?

3. State how he goes about?

A. His father brings him to my office nearly every morning and rolls him in a chair.

4. State whether or not it is true that he goes around all over town in his chair and has done so almost continually since soon after his injury?

A. Yes, sir, he has been pushed around over the town.

5. There is nothing about his physical condition that prevents him from reading and writing, a sedentary occupation, is there?

A. I do not know that I am capable of saying that now, I do not know whether his mentality is as it should be or not.

Redirect:

171 1. When was the first time you saw Mr. Melton?

A. I do not think I can give the exact date,—the 10th or 12th day of August 1905.

2. You do not know how long before that he had been going about in a chair?

A. No, sir, I do not.

3. Since that time he has been able to get about in a chair some one pushing him?

A. Yes, sir; no I will not say that; I will say soon afterwards; we went to the house and treated him first.

4. Had he begun to use a chair in August 1905 when you first began to treat him?

A. They had a house chair; and just had the chair he is in at present constructed, but I do not know how long before that.

5. Can he get about without assistance or some one pushing him and assisting him along?

A. No, sir, not on account of the condition of the streets.

6. State whether or not he can attend to the calls of nature without assistance?

A. No, sir. That is from the bowels; he can from the bladder by an effort at times and at times the catheter has to be used.

7. State whether or not in your opinion he will ever be able to walk?

172 (Defendant objects; overruled; defendant excepts.)

A. I think not.

(At this point plaintiff read the deposition of Dr. A. J. OCHSNER which is as follows; to-wit:)

The deposition of Dr. A. J. Oschsner taken at the office of Mr. O. A. Dreier, on the 25th day of May, 1906, in the City of Chicago, County of Cook, and State of Illinois, on the interrogatories and cross interrogatories hereto attached, to be read as evidence on behalf of plaintiff on the trial of the case now pending in the Hopkins Circuit Court, wherein Spencer Melton is plaintiff, and Louisville & Nashville Railroad is defendant.

Answer to Interrogatory No. 1. A. J. Oschsner—48 years of age—live at 710 Sedgwick St., Chicago, Ill. Surgeon. I have been engaged in the practice of Surgery for 20 years. I am Professor of Clinical Surgery at the College of Physicians and Surgeons; Surgeon in Chief at St. Mary's and Augustana Hospitals in the City of Chicago.

Answers to Interrogatory No. 2. I am acquainted with Mr. Spencer Melton, the plaintiff in this action. I first became acquainted with Mr. Melton in December 26th, 1905.

Answers to Interrogatory No. 3. I made an examination of the said Spencer Melton on December 27th, 1905. He was under
173 my observation from December 26th to December 28th, 1905.

Answers to Interrogatory No. 4. I found Mr. Spencer Melton suffering from a fracture of the spine which had caused a partial destruction of the spinal cord, causing a paralysis of both legs and partial paralysis of the bladder and rectum. This fracture was caused by a severe blow of some kind.

Answers to Interrogatory No. 5. I found an irregularity of the spine showing the location of the fracture, also an astrophic condition of the muscles of the legs and an absence of sensation and motion. His bladder and rectum were partially paralyzed.

Answers to Interrogatory No. 6. In my opinion it is likely that there will be some further improvement in his condition, but this will be very slight; His injuries will result in a permanent disability in the patient to perform ordinary manual labor. The amount of

my bill for services rendered is \$25.00. The Hospital charges were \$2.90.

(Signed)

A. J. OCHSNER.

STATE OF ILLINOIS, *County of Cook, ss:*

I, Otto A. Dreier, a Notary Public in and for the State and County aforesaid, do hereby certify that the foregoing deposition of
174 Dr. A. J. Ochsner, was taken before me at the time and place stated in the caption; that the said witness was duly sworn before giving it; that it was written by me in his presence and read to and subscribed by him in my presence; and that neither the plaintiff nor the defendant, were present in person or by attorney.

Given under my hand and seal of office this 25th day of May, 1906.

[SEAL.]

OTTO A. DREIER,
Notary Public, Cook County, Illinois.

My commission expires the 12th day of September 1909.

Fee for deposition \$2.00 paid by plaintiff.

175 Plaintiff here introduced the deposition of Dr. A. J. OCHSNER which was read to the jury by his attorneys and is as follows:

SPENCER MELTON,, Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Interrogatories.

Interrogatories to be propounded Dr. A. J. Ochsner of Chicago, Cook County, Illinois, in taking his deposition to be read as evidence on behalf of the Plaintiff, on the trial of the case now pending in the Hopkins Circuit Court, wherein Spencer Melton is plaintiff and the Louisville & Nashville Railroad Company is defendant.

Direct Interrogatories.

Interrogatory No. 1. Please state your name, age, residence and occupation? How long have you been engaged in the practice of medicine and surgery? What positions, if any, have you held in the past, and what position do you now hold?

Interrogatory No. 2. Are you acquainted with the plaintiff in this action, Mr. Speneer Melton? If you shall say you are state when you first became acquainted with him?

176 Interrogatory No. 3. Did you ever make an examination of the said Spencer Melton? If you have made such examination state the period over which it extended, and the period he was under your care, if he was under your care?

Interrogatory No. 4. Will you please state in detail the result of any examination made by you, what you found Mr. Melton's con-

dition to be, and what, in your opinion, caused or produced the conditions you found.

Interrogatory No. 5. In what condition did you find his spine and spinal cord? In what condition did you find his legs? In what condition did you find his bladder and rectum?

Interrogatory No. 6. Will you please state what, in your opinion are the chances for improvement in the condition of Spencer Melton compared to his condition at the time of the examination made by you? Are his injuries, in your opinion, permanent or temporary in their nature? What in your opinion will be the result of these injuries on his future life? To what extent, if at all, will he be able to perform manual labor?

Interrogatory No. 6. Please state the amount of your bill for services rendered, or the bill of the institution *which* which you are connected?

CLAY & CLAY.

Without waiving any objection to any question or answer it is agreed that the deposition of Dr. A. J. Ochsner, of Chicago, Ill., may be taken upon the above interrogatories; that the interrogatories may be sent direct to the witness, he to go before the officer who may take the same, all other proceedings thereafter to be taken as required by law.

Commission, and notice are waived.

CLAY & CLAY,

Attorneys for Plaintiff.

WADILL & DEMPSEY,

Attorneys for Defendant.

This May 18, 1906.

178 Also the witness JAMES CLAY called by plaintiff and testifies as follows:

1. Are you a licensed attorney at law?

A. Yes, sir.

2. Are you the attorney for plaintiff Spencer Melton in this case?

A. One of them, yes, sir.

3. You employed by Mr. Melton to represent him in this case?

A. Yes, sir.

4. After your employment as such attorney did you at any time demand of the Louisville & Nashville Railroad Company a view of the chain alleged to have caused this injury?

(Defendant objects; Sustained; plaintiff excepts and avows that if permitted to answer the witness would say "I did".)

5. Are you acquainted with Mr. John W. Logsdon?

A. Yes, sir.

6. What position does he hold with the Louisville & Nashville Railroad Company?

A. I think his official title is Superintendent of this division; just what this division is called I do not know.

7. Where is his office?

A. In Evansville, Ind.

8. Do you know whether his division includes the place of this injury, Howell, Indiana?

179 A. Yes, sir.

9. Did you since your employment as attorney for Mr. Melton make known to Mr. Logsdon that you were employed as such?

A. Yes, sir.

10. Did you visit him in his office?

A. Yes, sir.

11. Did you there request of him that he exhibit to you as the attorney for Spencer Melton the chain alleged to have caused the injury in this case?

(Defendant objects; sustained.)

12. Do you know where the chain that caused the accident in this case has been since the date of the accident?

(Defendant objects; sustained.)

13. I ask you to state whether or not you learned in that conversation with Mr. Logsdon that the said Chain was in the possession of the Louisville & Nashville Railroad Company?

(The defendant objects to this course of interrogatories; sustained by the court, to which plaintiff excepts.)

180 (The plaintiff here offered to read to the jury the pleadings in this case, to which the defendant objects and the court sustains said objection, to which ruling of the court the plaintiff excepts. The plaintiff then offered to read to the jury the Statute of Indiana as set forth in the first amendment to the petition, to the reading of which the defendant objects on the ground that it had already admitted it by pleading and for other reasons. The plaintiff moved the Court to require the defendant to state its other reasons for the objection; which motion the court overruled; to which ruling of the court the plaintiff excepts; and the court then sustained the objection of the defendant to the reading of said Indiana Statute to the jury, to which ruling of the court the plaintiff excepts.

Also the plaintiff SPENCER MELTON recalled by the attorneys for plaintiff and testifies as follows:

1. State to the jury your exact age at the time this injury was inflicted?

A. 28 years old, five months and eleven days.

(Plaintiff now introduces Dr. Wiggleworth's Life Table as contained in the Kentucky Statutes, page 1689. To which defendant objects; objection overruled; defendant excepts.)

Said table is read by plaintiff's attorney as follows:

"Table to be found in Carroll's Kentucky Statute; 1903, page 1689 showing the expectation of life in the United States according to Dr. Wigglesworth's Table: At the age of 28 the expectation of life is 31.80 years; at the age of 29 the expectation of life is 30.66 years."

(Plaintiff rests.)

182 By the COURT: Gentlemen of the jury, on the motion of plaintiff's attorneys, the court withdraws from your consideration the testimony of J. H. Shanks who testified as a witness on Saturday, and you will give it no consideration in making up your verdict in this case.

Defendant then moved the Court to peremptorily instruct the jury to find their verdict for the defendant for each and all of these reasons, namely:

First. There is no evidence of actionable negligence.

Second. The Indiana Statute upon which this action is based does not apply to the facts proven.

Third. In so far as the terms of the Indiana Statute applies in this action, covering the facts of this case, they are unconstitutional and void; they are discriminatory against defendant and deny it the equal protection of the laws; they are violative of the constitution of Indiana and of section one of article 14 of the constitution of the United States guaranteeing to the defendant the equal protection of the laws.

Fourth. The Indiana Statute upon which this action is based was not intended to be enforced outside of the State of Indiana and its enforcement in a Kentucky forum is against the policy of the State of Kentucky.

The Court overrules the motion on each and all of the
183 grounds, to which defendant in each and every instance excepts.

The witness W. C. SHROADES called for the defendant and testifies as follows:

1. Where do you live?

A. Evansville, Indiana.

2. Are you in the service of the L. & N. Railroad Company?

A. Yes, sir.

3. In what capacity?

A. Foreman of the crew of carpenters in the bridge and building departments.

4. Foreman of the crew of carpenters in the bridge and building department?

A. Yes, sir.

5. How long have you been such foreman?

A. I have been foreman ever since — 24th day of November, 1902.

6. How long have you been connected in that same character of work?

A. Since 1879, I have been acquainted with that kind of work.

7. How long have you been actively engaged in doing that character of work?

A. Since 1883, '82 or '83., I have been working on buildings of different kinds.

184 8. Have you been all of that time in the service of the L. & N. Railroad Company?

A. I have not.

9. Who constituted your crew of carpenters in doing this work at the time Melton was injured?

A. George Arlington, R. M. Carlton, Clarence Hopkins, C. W. Smith, Spencer Melton and A. McCutchen.

10. How long had you been at work in erecting these coal chutes for the Engle Coal Company at the time of the injury?

A. I could not say how many days we had been on that particular job.

11. Had you erected any bents?

A. We had raised two bents, we had only been raising them on the evening before; on the 20th of March we commenced raising bents into position,—sections.

12. Are you familiar with this diagram before the jury?

A. I see what it was intended to represent; some similarity of the plans we were working at; there is some difference in it.

13. What is the difference between the diagram and the actual state of facts at the time?

A. In the first place this piece is only three by eight; the upper part of the place where the figure 4 is, from the cross beam up was only three by eight; the upper part of this section the size is 4 by 8 about five feet down from the top; this piece here was not on 185 at all (indicating cross beam). That diagonal brace.

14. With the changes you suggest in bent four, is that a correct description for that bent?

A. That shows very plain.

15. Who put up and adjusted the pull-y block and hoisting rigging?

A. C. W. Smith. Attached the cling around the beam up there and hooked the pull-y block to it.

16. Did you adjust or fix any of the pulley block or rigging?

A. No particular part, I did not.

17. What part did you adjust or fix?

A. I may have hooked that on or adjusted it.

18. Adjusted the pulley block at 4?

A. Yes, sir; I am not certain that I did, but I saw that it was done.

19. The chain at 2 with which the hitch was made, was that chain used in raising bents 7 and 8 on the day before?

A. Yes, sir.

20. Do you know whether that chain was taken down with the rigging after 7 and 8 were erected and before bent 4 was erected?

A. I am not positive whether it was taken down or not; I always have the men to take down the ropes and lines whenever it is possible to be done in the evening.

21. Do you know whether it was done or not upon that occasion?

A. I do not know whether the chain was taken down or 186 not.

22. Did you give any orders or directions to the crew as to where the chain should be used, or as to what chain should be used or as to the ropes or rigging upon the occasion of the injury to Spencer Melton?

A. No, I did not give any strict orders for any particular sling to be used there or chain to be used at any particular place.

23. How was that done with your crew?

A. The men had been at that kind of work before, and I looked over the work and asked them in regard to how things were adjusted before there were any lifts taken.

24. Did you upon the occasion of raising bent 4 do the work and have the rigging adjusted in substantially the same way as in erecting bents 7 and 8 on the day before?

A. Yes, sir.

25. Which were the heaviest bent 7 and 8 or No. 4?

A. No. 4 was heavier, but No. 7 and 8 were raised with the,—one of these, I am not positive which one, was raised with the diagonal brace on. It was three by eight, 18 feet long?

26. With the exception of that brace were the bents of the same weight?

A. Same kind of material and the same hitches and everything on them with the exception of that one brace as near as I could tell.

187 27. Tell the jury how bent No. 4 was raised upon the occasion in which Melton was injured?

A. It was raised similar to the sketch you have here; the tripple block there, double block here, snatch block attached there, and the men pulled the line back that way, and had a turn around one of the posts of the old work, coal tippie, so that when they drew their line that they would not lose any slack, that they could rest at any time they had occasion and the work would not slip back. We propped the frame work up within a horizontal position with the foot resting against the cross still there and made our hitch with the rigging there with the tackle block and started raising it up and as we raised them we followed up with a piece of timber to relieve the weight.

28. Where were you in following up the bents of timbers with the prop?

A. I was on the right hand side.

29. Who was on the left hand side?

A. Melton and Clarence Hopkins was on this side; had been and we got about that height, and I told them for more men to go and pull on the line and Hopkins went to the line and Melton staid.

30. That left you under one bent and Melton under the other?

A. Yes, sir.

31. And each with a prop?

A. Yes, sir, prop in front of us.

32. Does that represent about the proper angle at the time of the falling of the bent?

188 A. Yes, sir, about; it was just high enough at the time that the rigging let go that my shoulder was under the post at the time about 12 or 13 feet from the point.

33. How high is your shoulder from the ground?

A. Give feet.

34. How tall are you?

A. Six feet two.

35. At the time of that fall was that bent in such position as to place much strain upon the hoisting rigging or not?

(Plaintiff objects; sustained; defendant excepts and avows that the witness would answer that the bent was in such a position of elevation that the strain was not great.)

36. In erecting bent 4 upon that occasion where was the strain the greatest upon the hoisting apparatus?

A. When it was first started up was the time that the strain was the greatest, when it was nearest on horizontal position; as a frame work rises up the strain gradually grows less until it comes to a perpendicular position and there is no strain at all. You have to have check lines at the rear to keep the structure from going the other way; of course the nearer that point you get the less the strain.

37. How long experience have you had in the raising of weights by the means that bent No. 4 was being raised?

189 A. U have had at least 24 years at that kind of experience at various times, not continuous.

38. How often would you have to use that character of hoisting rigging in raising weights?

A. That altogether depended on the character of work I did.

39. Did you use it frequently in your experience or not?

A. I have, some seasons I work for months on places of that kind; barns and ware houses and one kind of structure and another.

40. Have you erected other coal chutes or coal tipples?

A. Yes, sir.

41. Similar to the one being erected at that time?

A. Erected one at Guthrie with movable backs that was the same kind of timber except that the frame work inside of the sills go in the ground there, set on posts, rested on sills so that the back could be moved to suit the coal bins; the other one we built the fall before, completed I believe in September 1903. We built a set of bents with the same plan as this, out of the same kind of material on the opposite end of the old structure.

42. In doing this character of work did you use chains to make the hitch with?

(Plaintiff objects; overruled; plaintiff excepts.)

A. I invariably did.

43. Tell the jury why chains are used in that character of work?

190 A. My reason for using a chain for a sling is because I can get a closer hitch with it and it is less liable to shift on the beam, especially when I am lifting and have a hitch on a horizontal beam and lifting anything up in case you get this not well balanced one side would go down and the other one up, the rope would slip near the light side and in shifting the frame work around where the chain is harder than the wood and the links have a tendency to climb the wood closer.

44. In doing that character of work would you use a straight link chain or a twisted link chain?

A. I am not particular what kind; I have no preference; I was using at that time coyl link chain, slightly twisted.

45. I show you a link; state whether or not that is the link in the chain which was being used by you at the time (indicating link already in evidence)?

A. That is the one.

46. Say whether or not before bent No. 4 was erected that link had been used in similar work?

A. It had been used in the same work, yes, sir.

47. How often?

A. It had been used several times, I am not positive how many but I know it was used twice the day before on that particualr occasion.

48. Was that chain used in the same position in erecting two bents on the previous day as in erecting bent No. 4?

191 A. Yes, sir.

49. In your experience in raising and seeing structures erected by means of pull-y block and similar hoisting rigging state whether or not a chain was commonly used in making the sling?

A. Yes, sir.

50. State whether or not the carpenters' gang had a supply of chains and ropes and hoisting rigging from which a selection could be made for the work in hand?

A. Yes, sir, we always had a supply.

51. Who made the selection upon the occasion when Melton was hurt of the hoisting rigging and chains and appliances for raising bents 7 and 8 and 4?

A. I put the,—or had the stuff,—put it there my own self; done under my supervision.

52. Say whether or not there was a supply of sufficient and suitable material on hand for that purpose?

(Plaintiff objects; sustained; plaintiff withdraws objection.)

A. There was that that we considered sufficient; besides that we had plenty of more to draw from.

53. Did you regard the supply as suitable as well as sufficient?

A. I did; if I had not I would have gone to the carpenter's shop and brought out more; but I considered that in proportion to the class of work and weight of the material we were handling at the time.

54. State whether or not pulley block 3 should have been at point 4, or the block at 4 should have been at point 3?

192 A. I do not think any man of any knowledge of any rigging would have put the tippie block at that point and the double block at that and draw this way.

55. Was the arrangement as it was actually used upon the occasion Melton was injured a usual and proper arrangement for the hoisting rigging?

A. Yes, sir, everything was placed in proper position according to

my knowledge and experience with that kind of work and I have been on all kinds of vessels and other places that rigging is used.

56. Was it proper or usual to have the drop rope 11 come down to the snatch block immediately under block 3 as shown on the diagram, or should it have been at an oblique angle?

A. My experience teaches me that there is the proper place for it.

57. As given in the diagram?

A. Yes, sir.

58. Why do you think that is the proper place?

A. Well, one reason is to bring it down, using as little toll line as possible, come direct to your snatch block and then lead off through that in a position that you can get the best results from pulling on the line, the fall line.

58. Did those in charge of the end of line at 11 in pulling pull with a steady motion or with a succession of jerking motions?

A. They pulled with a surge.

60. State whether or not that is the usual and proper way of doing that work?

A. That is the most,—the easiest way; the main object in that that a man can make a pull and the man that has the turn at the back of him can take up the slack and you can take another hold there and relieve the strain on your hand a little bit, you can change your hand; you can get your foot in a good position and standing at that place and pulling the line that way the man back of you takes up the slack and you can release your hold and get over and get another hand, that is why that is practiced.

61. Is that a usual and proper practice in your experience?

A. On any ordinary light handlifting it is.

62. Was it proper in the lifting of a bent the size and weight of No. 4?

A. It was, yes, sir.

63. State whether or not a capstan at the end of line 11 was usual or necessary in work similar to that?

A. It is not necessary to have a capstan on that weight of work; of course if you had an extra heavy lift to make you would want to use a capstan, or crab or windlass of some description; various ways of taking the strain on a line that way.

64. State whether or not you at the time regarded the hoisting apparatus and its adjustments and the means of doing the work and manner thereof were in your opinion reasonably safe?

A. I did, or I would never have got myself under it; the same timbers fell on me that fell on Melton, except that I was in a position where I had advised all the men to be; not to stay directly under the thing, and I was on the far side when the timber fell on me; it knocked my body from under the weight.

65. You were not directly under your bent?

A. My left shoulder was under it, and I put my prop in that position in front of me.

66. Did Melton have knowledge that he should not be directly under the bent? If so, state whether you gave him advice or not on that point?

(Plaintiff objects; overruled; plaintiff excepts.)

A. I cautioned the men to be careful; that I did not want anybody hurt, and that we never knew when an accident might occur, plain enough for Melton and all the others to hear me. I always cautioned the men in regard to accidents.

67. Did you know at the time whether or not Melton was directly under his bent or not?

A. I did not know whether he was directly under it or not; because they had to lift the timbers off of me before I could see where Melton was.

68. Prior to the falling of the timbers did you know whether or not he was directly under his bent?

A. I did not.

69. State whether or not you had before the use of the chain in making the sling at No. 2 made any inspection or examination of it?

195 A. I had looked over the chain; been familiar with it for a year about; I never noticed any defects about it.

70. Was there any defect in the chain or in the link that gave way at the weld which was visible on the outside before the break by ordinary inspection?

A. There was not.

71. Say whether or not you saw the chain after it came apart at the weld?

A. I did, saw the chain and the broken link; took possession of them; took care of them.

72. What was the condition of the broken link at the weld when you first discovered it?

A. Looked similar to what it does now except—

73. After the accident?

A. Except that it has been handled now and looks as though it had been laid,—at that time just like any other chain that had been exposed a little; just a slight rust or dirt on the outside not to cover up anything; I examined it when I got hold of the link and the weld showed clean through, and a little spot there showed where the iron had adhered, and the other part had laid, so close together had been no dirt or anything ever collected in there, and I took it and locked it in the tool box and took care of it in the same condition.

74. Did you see anything about the weld that indicated that the weld was defective; if so, state what it was, after the injury?

196 A. After the weld parted I saw that it had been;—that the iron had only adhered in a small spot still it was laying so close together that it would have been you could not have told it from a solid weld clear through from an outside view.

75. In work of this character is it usual, proper and reasonably safe in your opinion to use a chain of the same character and appear-

ance as the chain which was in fact used in making the sling at No. 2?

A. Yes, sir, I do.

(Adjourned to dinner; met pursuant to adjournment.)

Also the witness C. C. HOPKINS called by defendant and testifies as follows:

1. Where do you live?

A. Live in Evansville.

2. What is your business?

A. Working carpenter's work on the road.

3. Are you in the service of the L. & N. Railroad Company?

A. No, sir, not now.

4. Have you been?

A. Yes, sir.

197 5. How long have you been in the carpenter's business?

A. I worked for the L. & N. two years and nine months.

6. How long have you been in the carpenter's business altogether?

A. I worked for it about—I could not tell; had not worked at it a great deal until went to work on the L. & N., probably five years altogether; more than that too, about seven years altogether.

7. Were you one of the carpenter's crew engaged in lifting the bent at the time of the injury of Melton?

A. Yes, sir.

8. Here is a diagram; do you understand that?

A. Yes, sir, it looks something similar, only this was not on there, this brace, (indicating diagonal piece) and this other side was not as large there, I think about 12 feet; I think it was about 12 feet where it was 3 by 8, from there on up.

9. Were you present when bents 7 and 8 were erected?

A. Yes, sir, I was there all the time.

10. Were bents 7 and 8 erected in the same way you were erecting bent 4?

A. Yes, sir.

11. With the same character of rigging and adjustment?

A. Yes, sir.

12. Was it the same rigging?

A. Yes, sir, it was all the same; we had raised these bents on this same, on the lower end of this old tippie here or coal chute
198 just below; we had raised these new ones, but I do not remember just how long, probably in the fall may be and this was early in the spring when this happened.

13. When did you raise 7 and 8, how long before you raised 4?

A. I could not tell you exactly; I think raised one maybe the day before or both. I am not sure about that.

14. You tell the jury what occurred in raising bent 4?

A. There was generally when went to raise about two of us got back here and lifted on this and the rest pulled on the line until got up about a certain distance and then it would pull up easier. I had just left Mr. Melton had not been I do not suppose over half a

minute away from him when that fell; I went to take hold of the line to pull and pulled I guess about twice on it and it gave way.

15. Who assisted in raising bent 4 by taking position at it?

A. There was Mr. Melton and the foreman and myself, I was with him; Mr. Melton on this side and the foreman was on that other side.

16. How were you raising the bent; did you have anything under it?

A. Had pieces braced under it and just lift it and push them forward.

17. How high had you got the be-t at the time you left?

A. It was up, was pretty good reach up to where these cross
199 pieces goes across, and I think it was about high enough so could pull it easy with block and rope and I just left there to go over and pull on the rope when it gave way.

I do not suppose it had been a minute or half a minute probably. It was up a pretty good distance back there of course; further up it was not so high; had got up in such an angle or pitch it would pull easy, generally went to pull on the rope then.

18. Had you had experience in the lifting of such timbers with pull-y blocks and that character of rigging?

A. Not a great deal.

19. How much?

A. I had worked on the others, and some at Guthrie, Kentucky, was all of that kind of work I had done.

20. Had you had experience with pull-y block and tackle in raising other structures?

A. Yes, sir, some, not a great deal.

21. What appliances did you use for the sling to hitch in adjusting the upper pulley block to stationary structure. What was the usual appliance?

A. We used this chain all the time; same chain on the work we done of that kind before.

22. That same chain that was used in this?

A. Yes, sir, same chain.

23. In the other work with which you had experience or observed, was the chain the appliance that was used in the sling or hitch?

200 A. I have seen it used; seen both; I never taken any particular notice to that which was best of anything, I have used both whichever come handy.

24. Is it usual and proper for the fall rope to come straight down to the snatch block and then out as on the diagram?

A. I suppose that would depend a good deal on what you had to hitch to.

25. Upon that occasion was that usual and proper?

A. Yes, sir, I think so.

26. Was there anything in your judgment about the appliance or the means or manner of doing the work upon that occasion which was not reasonably safe?

A. No, sir, I do not think there was; if I had not thought it was safe, I would not have wanted to have been where I was or where Mr. Melton was; I was right with him until just before it gave way.

27. Did you see the chain after the fall?

A. Yes, sir.

28. Did you observe the place where it gave way?

A. Yes, sir, I looked at it.

29. Looks like it?

— Yes, sir.

30. At the time it gave way, where did it give way, what part of the link?

A. Spread apart right here gave way.

31. Did the chain break or weld give away?

A. I suppose it was the weld; looked like it was welded there.

32. Did you observe at the time after the break whether
201 there was any defect in the weld?

A. Just after it broke we could see——.

33. Could that defect be seen before it broke?

A. No, sir, we would not seen anything wrong with it at all before it was broke; when we put it on it could not be noticed.

Cross-examination:

1. Did you assist in putting the chain up?

A. No, sir, I did not; there was a man by the name of Smith fastened the chain.

2. Where is Mr. Smith?

A. I do not think he is here.

3. Say you did not make any examination of it?

A. I never examined it particular at all; of course had always noticed.

4. You just saw the chain, that was all?

A. Yes, sir.

5. You saw the chain in position?

A. I saw it before several times; we used it in this work.

6. You did not assist in putting it up on this occasion?

A. No, sir.

7. Or any other occasion?

A. I never fastened it that I know of.

8. You just saw the chain on the ground?

A. I had it in my hand.

9. Did you ever make any close examination of that
202 chain, pick it up and look at it link by link?

A. No, sir, not link by link; I picked it up and it looked to be solid.

10. Just to hold it up and look at it looked to be solid?

A. Yes, sir, I never went over it link by link.

11. You had been working with this crew how long?

A. About two years and nine months.

12. Under Mr. Shrodes during the whole of that time?

A. Yes, sir, before that and after that altogether.

13. He was the boss of that crew?

A. Yes, sir.

14. The other men were under him?

A. Yes, sir.

15. They conformed to his orders; whatever he told them to do it was their duty to do?

A. Yes, sir.

Redirect:

1. Do you know where Mr. Smith is?

A. No, sir, I do not. He lives at Carmi; that is his home; I do not know whether he is there or not.

Cross-examination:

1. What railroad is Carmi on?

A. Louisville & Nashville Railroad.

203 Also the witness R. M. CARLTON called by defendant and testifies as follows:

1. Where do you live?

A. Live in Evansville.

2. What is your business?

A. I am a carpenter on the railroad.

3. How long have you been a carpenter?

A. I have been since first of February last a year ago.

4. Were you in the carpenter's crew with Mr. Melton at the time he was injured?

A. Yes, sir.

5. Were you present upon that occasion?

A. Yes, sir.

6. Had you at that time had any experience in this character of work?

A. No, sir, that was my first of the kind.

7. You tell what occurred upon the occasion within your knowledge?

A. This chain come apart and it fell is about all I know about it.

8. What were you doing?

A. I was pulling on a rope.

9. Do you understand that diagram?

A. That looks something like it.

10. Where were you pulling?

A. I reckon that must be me right there (indicating first man pulling on the rope).

204 11. Were you pulling on the rope?

A. Yes, sir.

12. Did you have any knowledge of anything defective or unsafe about the appliances?

A. No, sir.

13. Had you had any experience or observation in the proper way of doing that kind of work?

A. No, sir.

14. Did you see the link after the chain was broken?

A. Yes, sir.

15. Is this the link?

A. I do not know whether it is.

16. Does it look like it?

A. That is a link similar to the one that was there; whether or not this is the one I could not say.

17. Did you examine the weld of that link after it was broken?

A. Yes, sir, looked at it.

18. State what appearance it presented?

A. It did not look like it had been thoroughly stuck together.

19. Could that condition have been seen before it pulled apart?

A. No, I do not know that it could.

20. Did you observe it before it pulled apart?

A. No, sir.

205 Also the witness A. McCUTCHEN called by defendant and testifies as follows:

1. Where do you live?

A. Evansville, Ind.

2. What is your occupation?

A. Carpenter.

3. How long have you been a carpenter?

A. About twenty years.

4. Were you in the service of the L. & N. Railroad company as carpenter in the crew with Melton at the time of his injury?

A. Yes, sir.

5. How long had you then been in the service of the Railroad Company doing carpenter's work?

A. Been working in that crew for about a year and six months.

6. How long had you been working at that character of work?

A. I guess about three years.

7. How much experience have you had in the use of pulley blocks and rigging for the lifting of bents of timber and heavy objects?

A. About three years I suppose.

8. Are you familiar with this diagram?

A. Yes, sir, I believe I am.

9. You tell the jury what occurred upon the occasion in which Melton was injured?

A. Well, nothing more than Melton and our foreman was
206 working down here (indicating) I was over there on the rope with these other five pulling when the block gave way and he got hurt, or the chain rather.

10. When you say the block gave way, you say the chain gave way?

A. The chain gave way, is about the way it happened.

11. How long had that chain been used in similar work?

A. We used it right along there in our work.

12. How long before that had it been in use?

A. Since I was with them used it for hoisting before that; I do not know; I could not say.

13. They used it since you were with them?

A. Yes, sir.

14. Was that chain used in making the sling for the pulley block?

A. Yes, sir, when we had any of it to do.

15. State whether or not that same chain had been used in similar

positions and in a similar way by raising bents of the same weight and size and character?

A. We raised all on the other side of that.

16. How many bents on the other side of that similar to it?

A. I think ten, nine or ten.

17. Had you raised bents 7 and 8 also with the same appliance?

A. Yes, sir, with the same thing.

18. With your experience and observation about the appliance or chain or method of doing the work — that that was not proper, or not reasonably safe?

A. Well, no, sir, I think not. If there was I should hardly have worked at it myself.

19. In your judgment it was reasonably safe?

(Plaintiff objects; overruled; plaintiff excepts.)

A. Yes, sir.

20. Is the link that I show you the same link which gave way in that appliance upon that occasion?

A. I could not tell you.

21. Does it resemble it?

A. It resembles the chain.

22. Did you make an examination of the link after it gave way?

A. No, sir.

23. Did you see it at all?

A. No, sir.

24. When the bent four fell upon that occasion, who was injured by it?

A. The foreman and Melton.

Cross-examination :

1. How long did you say you had been working for the L. & N.?

A. About a year and six months.

2. You have been working altogether about a year and six months?

A. No, sir, then when that occurred.

3. Are you still with that crew?

A. No, sir, I am working for a different road.

208 4. When did you begin working for the L. & N.?

A. I think it was the 5th of July.

5. 5th of July preceeding the time Mr. Melton was hurt?

A. About a year and six months before that; no he was hurt in March and I commenced work the July before that.

6. The July before he was hurt, you were employed there to assist the crew in this work?

A. Yes, sir.

7. You have never been foreman of the crew?

A. No, sir.

8. Simply employed to do what the boss told you to do?

A. Yes, sir.

9. You used such tools as the boss put out for you to use,—appliances?

A. Such as were used on the work.

10. You or the other members of the crew had nothing to do with supplying the material or appliances in this kind of work at all?

A. The Company generally supplied the material.

11. And the foreman looked after that?

A. Yes, sir.

12. And kept them in place and supplied them to the hands as they needed them?

A. Yes, sir.

13. No part of Mr. Melton's duty or your duty to look after that, except to gather them up and see they were put back in the tool box after you got through, that was all?

A. Yes, sir.

14. You did not select the tools to use,—the foreman told you what to use?

A. Yes, sir.

15. And you and Mr. Melton just conformed to the foreman's orders, did what he told you to do?

A. Always under his orders.

Redirect:

1. Do you know where C. W. Smith is?

A. I could not tell you.

Also the witness GEORGE ARLINGTON called by defendant and testifies as follows:

1. Where do you live?

A. Live in Evansville.

2. What is your occupation?

A. Carpenter.

3. How long have you been a carpenter?

A. Off and on for about 12 or 14 years.

4. At the time Melton was injured, were you one of the crew in that gang?

210 A. Yes, sir.

5. How long had you had experience in that character of work using block and pulleys in raising timbers?

A. I never had none so far as that is concerned, for I never done any such work as that before; always done house work and did not require blocks and ropes.

6. You were not familiar with the use of blocks and tackles at that time?

A. Not personally, no; I had seen them used a good deal, never used them very much.

7. On that occasion what were you doing?

A. At the time of the accident?

8. Yes, sir.

A. Pulling on the rope.

9. Do you understand that diagram?

A. Yes, sir.

10. Where were you?

A. I do not know exactly; right here some place, I do not know whether first or second (indicating the five men pulling on rope).

And Spencer was on this side and Shrodes on the opposite side next to the Railroad track, and from where I was pulling here I could not see Spencer for these two posts; but I could see Shrodes and see his foot where it got caught under this timber, and I run to his rescue.

11. When the bent fell did it fall on both of them?

A. Caught Shrode's foot, had it up this way, and the
211 other four went to Spencer's rescue.

12. How long had you been in that gang?

A. Went to work the 6th day of February.

13. Were you in the gang in raising the other bents of the timber?

A. On these two, but besides that I had nothing to do with them, that was done the season before.

14. Do you know what constitutes proper appliance in block and tackle in hoisting apparatus of that character of work?

A. No, sir.

15. Did you see the chain after it broke?

A. I seen it; never took any close notice of it; I seen the chain and had it in my hand before put it there.

16. Before the chain was put up there did you notice the chain?

A. No, sir, not more than if done something else; just picked it up and went ahead never looked at it.

17. After the chain came apart at the weld, did you observe it at that time?

A. No, sir, did not; just seen it was broke and that was all; we were all scared around there so bad I did not know what to do for a good time, and I did not take any notice of it at all.

18. Do you know where C. W. Smith is?

A. He is at Carmi, Illinois, somewhere.

212 Cross-examination:

1. Carmi, Illinois, is on the Louisville & Nashville railroad?

A. I do not understand you.

2. When did you last see Smith?

A. I have not seen Smith for last month a year ago.

3. Is he in the employment of the L. & N. Railroad Company?

A. No, sir, he is a contractor in Carmi.

4. Carmi is on the L. & N. Railroad?

A. Yes, sir. I seen a fellow Saturday night said he was there.

(Objected to.)

5. Where did you say Shrodes got that chain?

A. I do not know.

6. When?

A. The day we raised the building.

7. Where did it come from?

A. I do not know; it was in the tool box with the rest of the tools and block that was needed on the road.

8. What kind of chain did it look like, what sort of chain was it?

A. Looked to me like a brake chain on a wagon.

9. What condition was it in?

A. As far as I know it was all right. Though I did not examine it.

213 10. Was that chain rusty?

A. Just about like any other chain would be that had been threw around for a while would get rusty.

11. The other chain in that tool box rusty too?

A. Everything in there in the shape of iron tool was rusty.

12. Saws rusty?

A. Have no saws in there except cross cuts, and they were used a good deal of the time and kept bright.

Also the witness A. B. McVEAY called by defendant and testifies as follows:

1. Where do you live?

A. At Evansville.

2. What is your business?

A. I have charge of bridge and buildings.

3. You have charge of buildings and bridges?

A. Yes, sir.

4. What railroad?

A. Louisville & Nashville.

5. How long have you had charge of the building of bridges and structures?

A. I have been in the present capacity about ten years.

6. Before that did you have experience in that line?

214 A. I was a foreman about twenty years before my present service.

7. Are you familiar with the manner of raising structures by use of pulley block and tackle?

A. Reasonably so, I suppose.

8. Here is a diagram; do you understand that diagram?

A. There are some familiar things about it.

9. You see the manner in which that rigging is adjusted?

A. Yes, sir.

10. Is that a proper and usual way of adjusting rigging?

A. Yes, sir.

11. Is it proper and usual to have the down rope 11 come straight down and to be attached to a snatch block, or should it be in an oblique position?

A. All kinds of positions are used; the most common is verticle hitch under the block.

12. Is that a reasonably safe position, the vertical position?

A. It is about the only position that could be used in that case.

13. Is it a reasonably safe one?

A. Yes, sir.

14. State whether or not it is usual or necessary to have a capstan at point 1 instead of men?

A. A capstan for raising a light weight is rarely if ever used; so light a weight as that is frequently raised with a single line, and

215 where the purchase obtained by power of blocks and line are used it is rarely ever necessary to use a capstan to lift a thousand or two pounds.

15. In raising a structure like bent 4, are you familiar with the weight and dimensions of bent 4 which was being erected at the time?

A. It was being done under my general supervision; not my immediate attention at the time.

16. Did you have knowledge of the size and character of the timber?

A. Yes, sir, I bought the timber and provided it there and had the plans, superintended the work.

17. In raising bent 4 what is the usual and proper method of raising it with pulley and block and tackle?

A. About the method they were using there is the only simple ready device.

18. The method upon this occasion is that regarded as a reasonably safe one?

A. Yes, sir; everybody uses it, I suppose.

19. In making a raise of such a bent with such appliances when is the greatest power necessary to raise the bent?

A. The greatest power is necessary when any object is on a dead horizontal plane; that is the maximum point of strain; but the bents as a matter of fact were put together at about $22\frac{1}{2}$ degree angle with the horizontal plane; the bents in fact were not lifted from a horizontal plane, level, as they were put together at

216 about that shape.

20. An angle of 22 degrees?

A. Yes, sir.

21. Then how were they lifted further?

A. With the application of the tackle block and line by the hitch shown.

22. As that bent is lifted further and further does the weight become more or less?

A. Less very rapidly after it starts over a point about that angle (indicating).

23. If the bent was in a position as shown upon the diagram what per cent. of power would be required in that position?

A. About two-thirds or three-fourths of the amount that it would take to lift it vertically up.

24. If a bent of timbers weighed 1000 or 1200 pounds what would be the greatest amount of power exerted to lift it even from a horizontal position?

A. It must be understood in answering that question that the bent was not lifted; it was only ended up; and it was started from a point similar to that; it was not lifted bodily at all; the end rested on the sills all the time; was put together that way; and was never in fact lifted as we understood the term lift; it was simply ended up to a vertical position. It is hard to say definitely just what power would be necessary to exert in lifting a thousand pounds from that position.

217 25. Would it be less than a thousand or more?

A. Undoubtedly it would be less.

26. Why would it be less?

A. It would be less from the fact they are not lifting the object, but simply ending it up; half of the weight is probably all the time on the ground, or the sill.

27. In making a hitch in that character of work, state whether or not a chain whose links are of the make I show you, the same which broke, if a chain of that make is a proper and reasonably safe appliance?

A. Chains are used for that purpose by everybody all over the world every day almost; they are used for many reasons.

28. Tell the jury why chains are used in making hitches at that point?

A. Chains are used at a place of that kind from the reason of their ready application, and the fact that they will not stretch and that they will not slip; they are readily applied; they are not materially effected by weather conditions; they do not wear so readily; if they do the wear is readily noticeable; and that can be inspected as well by one man as another; if they are defective any man with reasonable eyesight can see it as well as the most proficient expert; these are some of the many reasons.

29. What is the objection to using manillar ropes or steel ropes?

218 A. There are no objections to using them greater than that ropes cut more readily on sharp angles, edges of timber; they wear out much faster, manilla rope does; it is never known exactly what a manilla rope is; nobody can tell exactly whether it is perfect or not; it is rapidly effected by weather; it wears out much faster; breaks much more readily than chain when it is bent around a sharp angle; it cuts; iron or steel chains don't cut readily on wood and are not materially affected by bending around sharp angles, provided the links are of reasonable length.

30. Is the link which was used upon this occasion in making the hitch of reasonable length for such position?

A. Yes, sir, about the ordinary length, three inch link.

31. State whether or not the twisted condition of that link renders it defective or otherwise—?

A. The twist of a chain's links does not affect its tensile strength at all; the links of chains are twisted for many reasons; for ordinary purposes of hitching they are more flexible, less subject to twists by accident, they can be twisted one or more half turns, each link can and still not effect its tensile strength; whereas a straight link chain cannot be twisted within a quarter of a turn without giving to it a strain; links are twisted to make the chains
219 smoother so that a — may slip through it without catching in the link; a hook or ring will slip through a twisted link chain better than they will a straight link chain without hanging in the links.

32. Which will fit a square piece of timber better so as to make it secure, a twisted link chain or a rope?

A. The chain.

33. Which will do so a twisted link chain or a straight link chain?

A. There would probably be no difference between the twisted link chain in its adhesion to the timber than straight link chain; there are probably no advantages in favor of one over the other in that respect; the twisted link chain can be bent around the stick, more pliable; comes down and assumes the shape of the object hitched over more readily than the straight link chain would.

34. Did you see the link in question after it broke?

A. No, sir, not that day.

35. How soon afterwards?

A. I do not think I examined it at all; I talked about it, and saw the chain and link was in charge of my foreman Mr. Shrodes it was not made my purpose to look into it.

36. You did not see the chain before?

220 A. If I did it was in connection with a number of chains and such appliances; we have thousands of them; as a particular chain I did not examine it.

Cross-examination:

1. You said you ordered the timbers for that bent?

A. Yes, sir.

2. Where from?

A. I ordered them from Nebo or Maniteau; I bought the timber from L. W. —; it was cut in this county in Nebo or Maniteau; I do not now know where, it was—.

3. How long after you ordered them before you got them?

A. About a month or six weeks I think.

4. How long after they arrived before they commenced to put that work there.

A. Probably two or three weeks; I do not remember specifically; it was several days afterwards; may be a longer time.

5. What was the dimensions of the timber?

A. There was three or four hundred pieces; the dimensions of the timber in that particular bent was six by eight 22 feet long; another about 12 or 14 feet long and eight feet long; some 3 by 8.

6. The upright pieces there were made out of six by eight
221 timbers?

A. Yes, sir.

7. What kind of timber?

A. White oak.

8. You say that a chain is usually used in that kind of work?

A. Yes, sir, very usual.

9. Do you know what a short link chain is?

A. Yes, sir.

10. What is it?

A. A short link chain is simply,—the term is used to describe a shorter link; it does not designate anything particular.

11. Is not there a chain known to the trade as the regular short link chain, in which the links of the chain are almost round?

A. There are so many chains catalogued; the various manufacturers of chains use the various descriptive terms; I am not

familiar with the term short link chain,—the stoud link, twice link—

12. Are not there chain- that are usually used in that kind of work where chain is used, a round link chain, almost as broad as they are long?

A. The crown link chain is the nearest to the round link; there is not hardly such a thing as a round link chain; but with the style known as the crown chain, considered,—took its name from the old English term,—considered about the best chain.

222 13. Say that is considered to be the best chain?

A. It was considered at the time—

14. Is not that now the best chain?

A. I cannot say that.

15. Is not that a chain that is less likely to break than chains of this kind?

A. It is not made only in very small sizes, not so large a size wire as that.

16. Is not it made in a 5-16 inch size?

A. If so, I do not know of it. It is about the size of wire made into trace chains.

17. Do you remember the chain that is used at Slaughterville, in hoisting tobacco at Slaughterville?

A. Yes, sir, chains that are used on raising tobacco hogsheads you mean.

18. The link of that chain is almost round is it not?

A. It is about 2-3; it is about 1-3 longer than it is wide.

19. Is not a chain of that kind a much safer chain than this kind for use in putting around square timber?

A. No, sir, that chain is made to more readily run around shifts, that is the reason for it being made short link.

20. Is not a chain with a link of this kind much more apt to get on a square piece of timber in that shape than a round link chain (indicating).

A. As I say there are no round link chains I know of made.

223 21. That is a round link chain at Slaughterville; I mean a chain about 1-3 longer than it is wide.

A. Of course it stand- to human reason that the shorter the link the less leverage it would have.

22. The shorter the link the better it would adjust itself around that square piece of timber?

A. It would in that respect, but there are many other objections; it twists and kinks more readily and is not so easily detected.

23. I wish you would explain how a short link chain would kink more readily than a long link chain?

A. The- will kink more readily and defeat detection more easily because of the links being more numerous and shorter.

24. It has not got as much room to kink in as a longer link chain?

A. The kink takes place closest in the link, but the strain takes place as soon as the link is moved out of the exact horizontal.

25. Is not there more room for that kind of movement in a long link chain?

A. No, sir, not so much because the ends of each link are almost exactly together and shorter link, so short as that described in the tobacco hoisting, and they might wedge one another without being detected very readily.

26. What effect does the kink in the chain have upon the strength?

224 A. It has the effect of straining the iron in more than one direction.

27. A chain wrapped around a square piece of timber as shown in that way so that the link gets caught on the square timber in that shape, there is more than a tensile strength on that?

A. At that point.

28. There is both a tensile strain and a transverse strain?

A. Down strain.

29. That is a strain against the grain of the chain?

A. With iron being fibrous the link if it had a straight strain would bend down.

30. You have on this both a straight down and a horizontal pull or a pull across the chain bent?

A. You have a bent pull or cross pull.

31. That pulls across the chain?

A. Yes, sir.

32. So that in that kind of work there are two strains if the link gets in that shape?

A. Yes, sir, a bending strain and tensile.

33. What do the authorities call a bending strain?

A. They call it a break or sherring strain; it breaks it across the section as you break a stick with a kink in two.

225 34. A chain in that condition; a chain gets caught in that condition; does not that pull directly against the weld?

A. You could not pull on a chain at all without pulling against the weld.

35. A chain hung in, that shape is a direct pull downward?

A. Yes, sir, and a direct pull against the weld.

36. But the other chain would fit right over the weld that way?

A. Yes, sir, it is.

37. But when you get up that way it gets off of the other link, will get off the weld and pull against it?

A. Come off, it would twist nevertheless.

38. Is there any chain of that size liable to twist in that kind of work where you are giving it a jerking motion necessary to pull it.

A. The chain when it is hitched forces a continuous bend around the stick; you could not twist it after it is hitched.

39. Would not the attaching of the tackle there liable to get twisted in putting the block in at that point?

A. That depends altogether on how the hitch was made; if there was just one point around the stick the block hook would be hitched in that link, and bend around so, that the lines would run over the block and get down straight; it would not twist it.

- 226 40. The chain could kink in that shape?
 A. It could not get kinked because it could not move after it was hitched.
41. It could get kinked before it was hitched?
 A. It could be twisted ever so many times before it was hitched.
42. You were not present while this bent was being lifted?
 A. No, sir.
43. Did not see the rigging while it was up there?
 A. No, sir.
44. Do not know anything about how that chain was attached to the rigging?
 A. No, sir.
45. You are just speaking theoretically of the conditions at that time in the chain?
 A. Yes, sir, speaking about the question——
46. You say you never saw that chain that you know of?
 A. Only probably I saw it in a general collection of chains.

Redirect:

1. Do you know where Mr. C. W. Smith is?
 A. No, sir, I do not; he left the service about a year ago.
2. Do you know whether or not an effort has been made to produce him upon this trial?
 A. Yes, sir, I made considerable inquiry; he had left his home at Carmi, had moved away and I could not get any definite information as to where he had gone.
- 227 3. He has moved away from Carmi?
 A. Yes, sir.
4. And you could not locate him?
 A. I could not locate him.

Cross-examination:

1. Did you ask George Arlington where he was?
 A. No, sir, because George Arlington was in the hospital at the time I was making inquiry.
2. Did you ask Mr. McCutchen where he was?
 A. I did not see Mr. McCutchen.
3. Did you ask Mr. Carlton where he was?
 A. No, sir.
4. Did you ask Mr. Hopkins?
 A. No, sir.
5. Did you go to Carmi to find out whether he lived there?
 A. I had one of my men to go over there and make inquiry.
6. You did not make inquiry yourself?
 A. It was not made my special duty to look him up.
7. You did look him up?
 A. I exercised some diligence to find him as that was not in my department, but I reported to the Superintendent so that he might take steps.
- 228 8. When was that you made that?
 A. That was a few days before the sitting of this court; I do not remember exactly how long; two or three weeks ago.

9. Before that you never made any inquiry about him at all?

A. I did not know before that that Mr. Smith was wanted in the case; had no occasion.

The defendant offers as evidence the opinion of the Supreme Court of Indiana filed October 9, 1903 in the case of Southern Indiana Railroad Company *vs.* Harrall, published in 68 Northwestern Reporter, page 262, and in Volume 9 Railroad Reports, page 35.

Also opinion of the Supreme Court of Indiana filed January 29, 1904, in the case of Indianapolis & G. R. T. Co., *vs.* Foreman, published in 69 Northwestern Reporter, page 669, and 11 Railroad Reports, page 214.

Also the opinion of the Supreme Court of Indiana in the case of New Pittsburg & Coal & Coke Co. *vs.* Peterson, published in 229 136 Indiana Reports, page 398, and in 43 American State Reports, page 327.

The plaintiff objects; but it is agreed that the reading of such opinions from official reports be waived and that such opinions if competent may be read as evidence from the said books named.

The court is of the opinion that questions of law are for the court and not for the jury and for that reason rules that it is not proper to introduce the law of the case as evidence to the jury but to the court, and the court will permit the reading of the Reports to it in the absence of the jury; to which the defendant excepts.

Defendant now offers to read said opinions to the court as evidence of the common law of the State of Indiana; Plaintiff agreed that the books here introduced contain the cases as published in the official reports of Indiana.

Having been agreed by the parties that other reports than the authenticated State Reports may be used, the court rules that under that agreement these cases are competent to be read to the court as evidence of the common law of the State of Indiana; to which the plaintiff objects and excepts.

Said opinions are here read to the court in the absence of the jury as follows:

230 *Opinion of Supreme Court of Indiana, Filed October 9th, 1903, in the Case of Southern Indiana Railway Company v. Jackson H. Harrell.*

GILLET, J.:

This was an action for an injury to the person of appellee. He recovered in the court below, and the judgment was affirmed by the Second Division of the Appellate Court. Appellant appeals to this court under the third subdivision of section 1337j, Burns' Rev. St. 1901, and assigns as error here that said division erred in affirming the judgment of the trial court. We proceed to a consideration of such assignments of error in the Appellant Court as were not subsequently waived.

There were seven paragraphs of complaint, and appellant demurred to each of them. Its demurrer was overruled, and it re-

served a general exception to the ruling; Although appellant sought on appeal to question severally said ruling as to each of said paragraphs, yet, as the exception was in gross, we are compelled to hold that such assignments of error present no question for our consideration. *Noonan v. Bell*, 159 Ind. 329, 64 N. E. 909, and cases there cited.

Appellant further assigned as error that the Greene circuit court erred in overruling its motion for a new trial. Among other grounds for a new trial, appellant assigned in said motion that the verdict was contrary to the evidence, and further, that the
231 verdict was contrary to law.

The evidence showed the following state of facts; On July 5, 1899, appellant, a railroad corporation, was engaged in the construction of a railroad bridge over White River, in the county of Greene. A temporary work or bridge had been built over the river, on which a track had been laid. A stone pier was being built under the structure, and a number of men, including appellee, were engaged in its construction, under one John Gratzner. The necessary stone were unloaded from cars, and were placed in position by means of a derrick, which was erected upon a platform a few feet north of the track. The derrick's mast was so stayed as to give the top a slight inclination toward the south, with the result that in handling a heavy stone it had a tendency to swing toward the pier and track. There was evidence that the derrick was purposely so constructed with a view to its greater utility; but whether it can be said to have been defective or not, by reason of being so constructed it appears that appellee, whose principal business was to arrange the tackle about the stone and lower it from the cars, knew of such tendency, and had helped to hold a rope in keeping the boom and suspended stone from swinging over the track. There had never been an attempt to handle a stone when the portion of the track that was adjacent was occupied by moving locomotive or cars.

232 Near the close of working hours on the day in question a locomotive and two or three flat cars stood near the east end of said temporary bridge. A heavy stone, which had just been unloaded from one of said flat cars, lay upon the pier, occupying its intended place in the top course. A short distance to the west there were several flat cars, and still further on, and near the west end of the bridge, were a portable pile driver and its car. Appellee who testified that there was nothing for him to do at that time, was seated upon a projecting bent. He had not received a command as to what place he should occupy. The conductor of the train said to Gratzner, "John, are you going in with us?" The latter answered that he and his men were going to set the stone and return on the hand car. After about two minutes, occupied by the men in charge of the train in coupling the flat cars and the pile driver and its car together, the train, as thus made up, started east, and, before the pile driver reached the pier, the train was moving at a speed of from three to six miles an hour. In the meantime Gratzner ordered one of the men to signal the stationary engineer to raise the stone a little, it being necessary to make a mortar bed under it.

The signal was given, and the stone was raised about two feet before the pile driver had passed. Three men, Courtney, Clemens, and Polland, were holding the stone away from the track, by means of a rope after the stone was raised above the course in which it had rested. Clemmons and Polland let go of the rope, Clemmons going to

233 get his trowel and Polland going to get mortar. Courtney was thus left to hold the stone alone, and, as it proved too heavy for him, he abandoned the rope, and sought a place of safety.

The boom then swung around, and the chain which held the suspended stone caught on the running board of the pile driver. This caused the stone to swing east, and as it swung back it struck appellee, crushing one of his feet and injuring the other. It seems to have been but a brief interval after the stone swung clear until the chain caught on the running board, as a number of appellee's witnesses in effect testified. Appellee's witness, Helms, who was on the third of fourth car east of the pile driver, testified that the stone was not suspended as he passed the derrick, and that he was looking to see that all fall lines were clear. Gratzner had exclusive charge of the stonework. He directed the men and worked himself.

The various paragraphs of complaint rest on various theories. Negligence is charged against appellant in the construction of the derrick, and also against Gratzner and the conductor and the engineer severally. There is no charge that appellant did not exercise due care in the selection of said employees. Appellee's counsel say of the complaint; "The first five paragraphs minutely describe all the conditions and concurring causes of the injury. The sixth para-

234 graph is intended to be pleaded under the second subdivision of section 1 of the employers' liability act. The seventh paragraph charges negligence against the engineer of the train and the conductor, and also against Gratzner, charging them all as vice principals under the fourth subdivision of the act."

There was not a scintilla of evidence supporting the theory that either the conductor or the engineer was negligent. Neither of them is shown to have known that the stone was suspended or to have had any reason to apprehend that it was. The manner in which the derrick was constructed does not appear to have been the proximate cause of the accident. The derrick possessed a particular utility when constructed as it was, and it was ordinarily safe so long as it was used in accordance with the established custom that the evidence shows had before obtained. It was a master's duty to have the derrick properly constructed and maintained, but appellant was not bound to apprehend that its servant might put the same to a negligent use—a use wholly contrary to the custom that had obtained before the accident. See on the subject of proximate cause, *Enochs v. Pittsburgh, etc. R. Co.* 145 Ind. 635, 44 N. E. 658; 1 Thompson, *Commentaries Law of Neg.* §43 *et seq.*

This brings us to the question as to whether appellant was responsible for the negligence of Gratzner, assuming that he, as well as Clemmons and Polland, was guilty of negligence. As to the Employers Liability Act (section 7083 *et seq.*, Burns Rev. St. 1901), it is evident that appellant is not liable under the second subdivision of the

first section. That subdivision was not intended to create
 235 a liability based on an order or direction, where such order or direction was as broad as the whole service, and where the injured servant, without the compulsion of an order or direction from one whose order or direction he was required to obey, was at the time governing himself according to his own judgment as to what was proper. In so far as the fourth subdivision of said section is concerned, it does not appear that Gratzner belonged to any of the classes of servants particularly mentioned therein. The latter part of said subdivision is not any broader than the common law upon the subject; so we may as well consider the remaining question as to liability from that standpoint.

Assuming that Gratzner was negligent, as we have before done, it would follow that appellant might have been liable to a stranger; under the rule of respondent superior, had he been in appellee's place. But in appellee's case negligence could not be predicated on his injury if it was a result of one of the risks of the service, because as to those risks which the servant assumes there is no duty. *American Rolling Mill Co. v. Hullinger* (at last term) 67 N. E. 986; *Fitzgerald v. Connecticut River Paper Co.*, 155 Mass. 155, 29 N. E. 464, 31 Am. St. Rep. 537.

When the contract of service is entered into the master impliedly contracts that he will exercise ordinary care in the selection
 236 and retention of the employee's co-servants, and such employee impliedly contracts that, this requirement complied with, he will assume, as one of the risks of the service, the perils of injury from the negligence of such co-servants. If appellee has made out a case, it must appear that in giving the order to raise the stone Gratzner was acting as a vice principal, and not as a mere fellow servant. The controlling consideration in determining whether an employee is a vice principal is, not his comparative rank, not his authority to command, and not his authority to employ and discharge, but whether he is the representative of the master in respect to those duties which the master cannot escape by a delegation of them. *Indiana Car Co. v. Parker*, 100 Ind. 181; *New Pittsburgh, etc., Co. v. Peterson*, 136 Ind. 398, 35 N. E. 743 Am. St. Rep. 327; *Robertson v. Chicago, etc. R. Co.*, 146 Ind. 486, 45 N. E. 655; *Southern Indiana R. Co. v. Martin* (Ind. Sup.) 66 N. E. 886; and see further monographic note, *Lafayette Bridge Co. v. Olsen*, 54 L. R. A. 1. One of the leading duties of a master, except in instances when it can be said that the complaining servant has assumed the particular risk, is to use ordinary care to keep the place where such servant is employed in as safe a condition as the nature of the employment fairly admits of. To make the above statement certain requires a consideration of the meaning of the word "place."
 237 If by this it is meant that the master, by himself or representative, must be always present to ward off every transient peril that may menace the servant in the particular spot or place that he may chance to occupy while engaged in the performance of his work, then it must be affirmed that the rule of law devolves upon the master a duty that in many instances it would be wholly impracticable to discharge. A railroad company could scarcely employ vice principals enough to make it sufficiently argus-eyed to guard its

servants to that extent. Furthermore, it is to be observed that in some lines of business, like the operation of a railroad, many servants are employed whose respective duties are so correlated that in the very forwarding of the masters business they are protecting the lives and limbs of their co-servants; and if some limitation be not put upon the word "place", as respects transient dangers in the conducting of the details of the business, then every one of such servants becomes, for some purposes, a vice principal, and the integrity of the co-servant rule is destroyed.

In *Fraser v. Red River Lumber Co.*, 45 Minn. 235, 47 N. W. 785, it was said: "While we have no disposition to impinge upon the just and salutary rule that makes it the primary duty of the master to furnish to his servants safe instrumentalities and places for
238 work, yet we are satisfied that in many cases the courts, by indulging in too much refined and artificial reasoning, have carried the rule altogether too far, and have often held the master liable in cases where the untutored minds of laymen, in the exercise merely of common sense, would unhesitatingly say that the master had not been derelict in the performance of any duty towards his servants. When it is considered that, where numerous employees are all engaged in prosecuting the same general object, there is hardly one of them whose duties do not, in part at least, in some way relate to or affect the safety of the instrumentalities with which, or of the places in which, the others work, it is easy to see that the rule referred to may be, as it often has been, carried so far as to practically abrogate the whole doctrine of "common employment". We shall not attempt to do what no court has yet been able to do, viz., to formulate a statement of the rule that will furnish a test by which to determine every case; but we may suggest that, in our opinion, an important consideration, often overlooked, is whether the structure, appliance, or instrumentality is one which has been furnished for the work in which the servants are to be engaged, or whether the furnishing and preparation of it is itself part of the work which they are employed to perform. If it be the latter, then, as it is well settled by our decisions, the master is not liable."

239 In *Perry v. Rogers*, 157 N. Y. 251, 51 N. E. 1021, Parker C. J., observes that, "under the guise of an application of the rule requiring a master to furnish a reasonably safe place for his servants to work in, other attempts, before this, have been made to deprive a defendant of the benefit of another equally well-settled and just rule of the law of negligence, that a party shall not be held responsible to a servant for an injury occasioned by the negligence of a competent co-employee".

As was said in the decision of *Butler v. Townsend*, 126 N. Y. 105, 26 N. E. 1017: "A place, in its broad sense, is never safe in which an accident happens, and an accident always happens in some place, and so the master might almost become an insurer."

In line with the above observations are the following expressions from the decision of *Herman v. Port Blakely Mill Co.* (D. C.) 71 Fed. 853; "The work 'place', in my judgment, means the premises where the work is being done, and does not comprehend the negligent acts of fellow servants, by reason of which the place is rendered unsafe or dangerous. The fact that the negligent act of a fellow

servant renders a place of work unsafe is no sure and safe test of the master's duty and liability in this respect, for it may well be said that any negligence which results in damage to some one makes a particular spot or place dangerous or unsafe. To so hold would virtually be making the master responsible for any negligence of a fellow servant which renders a place of work unsafe or dangerous. It would be doing the very thing which it is the policy and object of the general rule not to do. It would create a liability which the master could not avoid by the exercise of any degree of foresight or care." To the same effect, see *Armour v. Hahn*, 111 U. S. 313, 4 Sup. Ct. 433, 28 L. Ed. 440; *Baird v. Reilly*, 92 Fed. 884 35 C. C. A. 78; *Cleveland, etc. R. Co. v. Brown*, 73 Fed. 970, 20 C. C. A. 147; *City of Minneapolis v. Lundin*, 58 Fed. 525, 7 C. C. A. 344.

"The test of liability," said the court in *Sofield v. Guggenheim Smelting Co.*, 64 N. J. Law, 605, 46 Atl. 711, 50 L. R. A. 417: "is not the safety of the place or appliance at the instant of injury, but the character of the duty the negligent performance of which caused the injury." In the case of *The Queen* (D. C.) 40 Fed. 694, we find the following language: "It would be absurd to say that the owners owned a duty to the seamen that too long a hawser should never be used, or that signals in a fog should be properly given by their own vessel. These details belong to the ordinary work of navigation, and to the men employed to conduct it. As to this work, the owners own no duty to the officers or seamen to see it properly performed."

241 In the endeavor to so correlate the deep-rooted doctrines relative to the master's duty to his servant and the servant's assumption of risk with respect to his co-employees as to maintain such doctrines in a proper relation, we find it stated by the courts that the master is not liable to his servant for the negligence of his co-servants in respect to the details of the work (*Central R. Co. v. Keegan*, 160 U. S. 259; 16 Sup. Ct. 269, 40 L. Ed. 418; *Southern Indiana R. Co. v. Martin* (Ind. Sup.) 66 N. E. 886; *O'Brien v. American Dredging Co.*, 53 N. J. Law, 291, 21 Atl. 324; *Baird v. Reilly*, 92 Fed. 884, 35 C. C. A. 78; *Hussey v. Cogger*, 112 N. Y. 614, 20 N. E. 556, 3 L. R. A., 559, 8 Am. St. Rep. 787; *Geoghegan v. Atlas S. S. Co.* (Compl.) 22 N. Y. Supp. 749) that he is not bound to protect his servant against the mere transitory perils that the execution of the work occasions (*Whittaker v. Bent*, 167 Mass. 588, 46 N. E. 121; *Meehan v. Speirs Mfg Co.*, 172 Mass. 375, 52 N. E. 518); and that he is not liable merely because a co-servant negligently handles appliances in such a way as to occasion injury to an employee (*Howard v. Denver, etc., R. Co.* (C. C.) 26 Fed. 837; *St. Louis, etc. R. Co. v. Needham* 63 Fed. 107 11 C. C. A. 56, 25 L. R. A. 833; *Snow v. Housatonic R. Co.*, 8 Allen, 441, 85 Am. Dec. 720; *Jones v. Granite Mills*, 126 Mass. 84, 30 Am. Rep. 661; *Baron v. Detroit, etc., Nav. Co.* 91 Mich. 585, 52 N. W. 22).

In *Hodges v. Standard Wheel Co.*, 152 Ind. 680, 52 N. E. 393, it was said: "That appellee did not owe to appellant, as its employee, under the circumstances, the legal duty to support the rims in question by the hands of some one of its agents or representatives, in the manner as Huey was doing just previous to the accident, is cer-

tainly evident. If it could be said to be charged with that duty, then every corporation engaged in the same line of business as it was would, in legal contemplation, be required to be present at all times at its factory when lumber, timber, or iron, or other heavy material of like character, was being handled or moved by some of its employees, and by the hands of such agents or representatives prevent such iron, timber or lumber or other material connected therewith, from slipping or falling upon said employees, and thereby injuring them."

It has been said that the boundary line between the act of the master and the act of an employee is sometimes quite vague and shadowy. *Vitto v. Farley* (Sup.) 44 N. Y. Supp. 1; *Hankins v. New York, etc., R. Co.*, 142 N. Y. 416, 37 N. E. 466, 25 L. R. A. 396, 40 Am. St. Rep. 616. We realize, as was in effect stated in *Island Coal Co. v. Swaggerty*, 159, Ind. 664, 62 N. E. 1103, 65

243 N. E. 1026, that the duty of the master is a continuing one, and that until the agent selected by the master acts up to the limit of the duty of the master to act the master's duty is not done. We further realize that any one of many circumstances may become the basis for the governing principle with regard to the extent of the master's duty, but after all we think there is but one test by which the master's liability to a servant in such cases is to be determined, and that is the one already suggested—was it a master's duty that was neglected?

Granting that for some purposes the man Gratzner was a vice principal, we are unable to perceive that he was acting in that capacity at the time that he gave the alleged negligent order. The risk of injury from the negligence of a foreman is as much within the servant's assumption as is the risk that he may be injured by the act of any other co-servant. *Southern Indiana R. Co. v. Martin* (Ind. Sup.) 66 N. E. 886; *Herner v. Baltimore, etc., R. Co.*, 149 Ind. 21, 48 N. E. 364; *Central R. Co. v. Keegan*, 160 U. S. 259, 16 Sup. Ct. 269, 40 L. Ed. 418; *O'Brien v. American Dredging Co.*, 53 N. J. Law, 291, 21 Atl. 324. An employee of the master may act in a dual capacity—as his representative and as his servant. *Southern Indiana R. Co. v. Martin supra*; *Herner v. Baltimore &c. R. Co. Supra*, *National Fertilizer Co. v. Travis*, 102 Tenn. 16, 49 S. W. 832; *Cumberland, etc., R. Co., v. State*, 44 Md. 283. The evidence in this case shows that Gratzner took part in the physical work of setting stone in the construction of a pier, and he was

244 working as a servant when he gave the order looking to the setting of the stone which injured appellee.

To sum up the question as to the claim of a common-law liability: The appellant was not bound to have a representative present at every moment to keep the place that appellee might chance to occupy safe, as against the possible negligence of a co-employee. The man Gratzner was engaged at the time of his alleged negligence as a servant in forwarding the work. Appellee and Gratzner were co-servants, and as it is not alleged or proved that appellant did not exercise due care in the selection and retention of such foreman, it

follows that appellant is not liable for his negligence in the particular instance.

The judgments of the Green circuit court and the Appellate Court are reversed, and the former court is directed to award appellant a new trial."

- 245 *Opinion of the Supreme Court of Indiana, 136 Ind. Rep., Page 398, New Pittsburg Coal and Coke Company v. Peterson.*

HACKNEY, J.:

The appellee sued the appellant in the court below for personal injuries, and recovered judgment for five thousand dollars.

His complaint was in four paragraphs, the first of which was, in substance, as follows:

The appellee was employed to do general work in and about the appellant's coke-yards, and to haul away ashes and other refuse, haul slack, and clean the yards, from July 30, 1888, to and including February 19, 1889; that he was inexperienced in working with machinery, as the defendant well knew; that on said last-named day one Gus Lawrence was defendant's agent to employ and discharge its workmen, including the plaintiff, and to control their work; that said Lawrence negligently directed the plaintiff to clean certain of defendant's slack-elevators, and the place of performing such work was dangerous, in that it became necessary to stand close to the machinery of the elevators, and upon the buckets there of and that, if the machinery was put in motion while he was so occupied, injury was sure to follow, of which dangers said defendant well knew; that plaintiff entered upon the work so assigned, in the presence and under the direction of said Lawrence, and "reposed confidence in the prudence and caution of the defendant, and that defendant would notify him of the starting of the machinery, so that he could remove" from its dangers; that while so engaged, and without notice or warning, the defendant negligently put the machinery in motion, whereby plaintiff, without fault or negligence on his part, was drawn into the guide of the elevator belt and buckets, and sustained the injuries complained of.

The second paragraph varies from the first only in alleging that the plaintiff's employment was special, in that it was to haul slack, clean the yard, and haul ashes and other refuse, and that he was inexperienced and unacquainted with the use of said machinery, and ignorant of the dangerous character of the work.

The third paragraph is, in effect, the same as the second, excepting that it alleges that the plaintiff was directed to perform said service near the time for starting the machinery in motion, and that the defendant knew, or by ordinary care could have known, of the nearness of the time for starting said machinery, and that it would start while plaintiff was so engaged, and of his dangerous situation.

The fourth paragraph differs from the first only in alleging, in addition to the facts contained in the first, "that the place furnished

the plaintiff to work in was not a safe place, but was extremely dangerous in this, that death or great bodily harm was sure to result to one who occupied the place so assigned the plaintiff, when the machinery was in motion," and "that plaintiff did not know of
247 the proximity of the time for starting said machinery." This paragraph, however, does not allege negligence in the starting of the machinery, or that it was started by the defendant or its servants.

In considering the sufficiency of this complaint it is essential that we keep in view the theory upon which it proceeds; in other words the duty of the master for the violation of which a recovery is claimed. The master is not charged with supplying improper, imperfect, or unusual machinery for the purposes in which it engaged the servants operating the mill, nor is it alleged that there was any negligence in employing or retaining in the service ignorant, unskilled or habitually negligent servants nor is it an element of the cause of action that the master failed to adopt proper rules for the government of its servants, nor that the machinery was started in violation of such rules as to the time or manner thereof.

The necessary conclusion is that the injury complained of was the result of negligence in not delaying the starting of the machinery while Peterson was in the elevator. We are not to presume that the engineer knew of Peterson's situation when he started the machinery, nor can we presume that he started the machinery at an unusual time. More briefly stated, it is not for us to presume that the engineer acted willfully or negligently.

The only negligence charged is that of Lawrence. If he was a fellow-servant of Peterson, and not a vice-principal, all of the
248 paragraphs of complaint were bad. The allegation of Lawrence's relation to the master, as we find it in every paragraph, was that one Gus Lawrence was defendant's agent, with full authority "to control the work of and to employ and discharge the plaintiff from his employment, as well as other servants of said defendant."

Whether Lawrence was a vice principal in performing the service in which his negligence caused the appellee's injury must be determined from this allegation, in the light of the authorities. But for this allegation it clearly appears that the appellee and Lawrence were serving the same common master, and were engaged in the same common pursuit, in accomplishing the same common object, and were, therefore, fellow-servants.

The question of rank and of power to employ and discharge servants are not controlling in the consideration of the relation of Lawrence to the appellant; Justice *v. Pennsylvania Co.*, 130 Ind. 321; 30 N. E. 303. As there said, in effect, the controlling consideration
402 is whether the act or omission is one arising from a duty owing by the master to the servant, the discharge of which duty is intrusted by the master to the negligent servant.

In *Brazil etc. Coal Co. v. Cain*, 98 Ind. 282, the complaint alleged that Hopkins was the master's "bank boss, and, as such had
249 charge of its coal mine and control of the men working therein, and it was his duty to look after; care for, and superin-

tend said mine, and the entire workings therein, and to secure and keep the rooms, entrances, and openings of such mine in a safe condition." This was held insufficient to charge the master with the negligence of Hopkins as a vice-principal.

This case had been followed with approval in numerous cases, including *Indiana Car Co. v. Parker*, 100 Ind. 181; *Pittsburg etc. Ry. Co. v. Adams*, 105 Ind. 151; *Lake Shore etc. Ry. Co. v. Stupak*, 108 Ind. 1; *Indiana etc. Ry. Co. v. Dailey*, 110 Ind. 75; *Cincinnati etc. R. R. Co. v. McMullen*, 117 Ind. 439, 10 Am. St. Rep. 67.

The most that can be claimed for the allegations of the complaint before us, upon the question under immediate consideration, is that Lawrence was the master's foreman as to the labors of Peterson and others of the master's employees.

That a foreman may be, and that he is, ordinarily, but a fellow-servant is very fully discussed in *Indiana Car Co. v. Parker*, 100 Ind. 181, where many of the cases on the subject are reviewed. In that case the distinction is clearly made between cases where the service of the foreman or other employee of superior rank involves the performance of some duty owing by the master to his servants as in the supplying of proper machinery or safe places to work, and those cases where the duty violated is one, not of the master, but of
250 one servant to another (403) engaged in one common employment. There some of the cases cited by the appellee in this case are reviewed, and their application to a case not involving a duty of the master is denied. So it may be said of all other cases cited by the appellee in this case. They involve authority from the master to the foreman to supply proper machinery and safe working places,—duties clearly owing by the master, and which could not be so delegated as to absolve him from liability.

In cleaning the elevator the appellee and Lawrence were discharging a duty owing from both to the master, and they were necessarily fellow servants. The negligence of Lawrence in failing to prevent the starting of the machinery is not shown to have been the omission of a duty expressly or impliedly delegated to him by the master.

In every case the position of vice-principal must be determined by ascertaining whether the act performed or duty omitted is one, the doing of which is charged upon the master and delegated to the servant. In other words, whether the servant has been put in the place of the master as to the particular service performed or omitted. If he has, and his act or omission while in that particular service involves a duty owing by the master to the servant, the
251 master is liable for injury resulting from such act or omission, if the injured servant is free from negligence, and has not assumed the hazard.

In *Spencer v. Ohio etc. Ry. Co.* 130 Ind. 181, Spencer was directed, by one under whose orders he was required to work, to clean a locomotive, and, while engaged in the task, under the boiler, the engineer started the locomotive and ran upon him. It was there said: "If there was negligence on the part of the employees of the company, either in ordering him to clean the engine, or of the

engineer in starting the engine, it was the negligence (404) of a co-employee, for which the appellee is not responsible": *Wilson v. Madison etc. R. R. Co.*, 18 Ind. 226; *Gormley v. Ohio etc. Ry. Co.* 72 Ind. 31; *Ewald v. Chicago etc. Ry. Co.*, 70 Wis. 420; 5 Am. St. Rep. 178; *Pease v. Chicago etc. Ry. Co.*, 61 Wis. 163; *Bergstrom v. Staples*, 82 Mich. 654.

In *Pease v. Chicago, etc., Ry. Co.* 61 Wis. 163, is quoted, with approval, from *Heine v. Chicago etc. Ry. Co.*, 58 Wis. 528, as follows: "The fact that the negligent employee has the power to direct and order the acts and movements of the one injured does not take the case out of such (fellow-servant) rule."

The case of *Bergstrom v. Staples*, 82 Mich. 654, makes the distinction between cases where injury is the result of imperfect
252 or insufficient machinery, rendering the place of service dangerous, and cases where the service is hazardous because of those dangers which are necessarily incident to use of proper machinery, and the case may be regarded upon the construction we have given the complaint before us.

The case of *Ell v. Northern Pac. R. R. Co.*, 1 N. Dak. 336, 26 Am. 336, 26 Am. St. Rep. 621, is a very instructive case, and holds the fellow-servant rule not to depend upon the rank of the negligent servant, but upon the fact as to whether the duty omitted is one owing from the master to the injured servant, and one the discharge of which the master has conferred upon the negligent servant. There the negligent servant was in control of the men and the work, with authority to direct and supervise, and power to employ and discharge. The negligence was in failing to block a long pile which was being removed from a car upon skids, the foreman having knowledge that, to omit such blocking, one end of the pile would slide faster than the other, and, in doing so, fall between the skids, where the injured servant was (405) working. The foreman was held to be a fellow-servant of the injured employee. The fellow-servant rule is founded in wisdom, and any departure from it is dangerous to the prosperity and perpetuity of the enterprises of manufacturing, mining, railroading, and those industries requiring the services of many servants. More than this, it increases the

253 dangers to such servants who may be so employed. When the master has supplied a safe place to work, has employed skillful and diligent servants, and has furnished suitable and safe appliances with which to perform the service, it is a rare instance in which he is liable for injuries to his servants. The servants owe to the master a diligent and watchful care over his business, and they owe to each other a vigilance and caution for their own safety. The master should not be held for the consequences of their unfaithfulness to him unless he continues them with knowledge of their faithlessness. The master should not be liable for their neglect of the duty they owe to each other, for that is by no fault of his. The rule which deprives them of compensation for injuries sustained from the neglect each of the other inspires that care and vigilance in the discharge of their duties, both to the master and to themselves, which is essential to the welfare of the master and the safety

of each other. When the rule is destroyed its inducement to care is gone, and the master, if not liable for the fault of his servants as between themselves, has servants whose duties require no care excepting that each shall look to his own safety.

Where it does not appear that the master had violated a duty owing to his servant, there is not, and should not, be any liability by the master. The burden must rest upon the injured servant to show, by his complaint, that some duty of the master has
 254 been violated. If that duty (406) is one of the discharge of which has been delegated to another, not only the duty, but the delegation of it, as well as its violation must be shown.

The complaint before us fails to plead facts taking the case out of the general rule. Nothing is alleged from which we can infer a breach of duty by the master, or by one standing, by authority, in the place of the master, in the performance of any duty owing by the master.

We conclude, therefore, that the allegations of the complaint are not sufficient to establish the relation of vice-principal by Lawrence the alleged negligent servant.

The judgment of the circuit court is reversed.

255 *Opinion of Supreme Court of Indiana, Filed January 29th, 1904.*

INDIANAPOLIS AND GREENFIELD RAPID TRANSIT COMPANY

v.

MARION S. FOREMAN.

MONKS, J.:

Appellee brought this action against appellant and the Kirkpatrick Construction Company, a corporation, to recover for a personal injury alleged to have been caused by the negligence of said corporations. The defendants jointly filed a demurrer to each paragraph of the amended complaint, and each defendant filed a separate demurrer to each paragraph of the complaint. These demurrers, which challenged each paragraph of the complaint for want of facts, were overruled by the court, to which ruling the defendants "jointly and separately excepted." A trial of said cause resulted in a general verdict against appellee as to the Kirkpatrick Company and in favor of appellee against appellant. Appellant filed a motion for a new trial which was overruled, and judgment was rendered on the verdict in favor of appellee. The errors assigned call in question the action of the court in overruling (1) the joint demurrer of appellant and said construction company to the amended complaint, (2) the separate demurrer of appellant to each paragraph of the amended complaint, and (3) appellant's motion for a new trial. The amended complaint is also challenged by an assignment that the same "does not state facts sufficient to constitute a cause of action."

256 Appellee insists that appellant's assignment of error predicated upon the exception taken by appellant to the rulings on
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the demurrers to each paragraph of the complaint presents no question as to the sufficiency of the paragraphs thereof, citing *City of South Bend v. Turner*, 156 Ind. 418, 421, 60 N. E. 271, 54 L. R. A. 396, 83 Am. St. Rep. 200. It will be observed that in the case cited the exception was joint, while in this case the defendants "jointly and separately excepted." It is clear, therefore, that the case cited is not in point here. The first paragraph of the amended complaint proceeds upon a common-law liability. Appellant was, on May 27, 1901, "a corporation owning and operating an inter-urban street railway extending from Irvington to Greenfield, in this state, and was a common carrier of passengers for hire. On said day appellee was an employee of appellant as a common laborer, and was engaged with divers others in constructing a spur from appellant's track to Spring Lake, a distance of three fourths of a mile. Appellant had in use on said day a car known as a "work car," which had been and was used in carrying its employees to divers points along said road where they were engaged and employed by appellant in building, maintaining, and repairing its said line of road. After said day's work had been finished, at about 6:30 p. m., appellee, with divers other employees of appellant, entered said work car on said spur for the purpose of being carried to Greenfield, where he resided. While he was in said car, and the same was standing on a switch of appellant's road, one of appellant's passenger cars in charge of its employees approached said switch from the west at a high and dangerous rate of speed, to wit, 30 miles per hour, and ran into and upon said switch and collided with said work car and injured appellee." In addition to the averments in the first paragraph of the amended complaint showing the above facts, there are other allegations showing that the collision and consequent injury of appellee were caused by the negligence and carelessness of appellant's employees in charge of said passenger car in not obeying the rules of appellant.

It is also alleged in said first paragraph that "the work in which appellee was engaged was common labor upon the tracks of appellant, and had no connection with, nor was the same in any manner incident to or a part of the work of employment of said motor-man or servants in charge of the passenger car; nor were the squad of laborers with whom said appellee was working as aforesaid, and who were with him in said work car, in any manner connected or associated with the said servants of appellant in charge of said work car or said passenger car which collided with it; that appellee had no charge of said work car or the operation thereof, but was simply a passenger thereon at the time of the accident." Appellee says that this "paragraph of the complaint proceeds upon a common-law liability," and that the same is sufficient, because it is alleged that his injury was occasioned by the negligence of other servants of the company, whose duties were not common nor in the same department with those of the appellee; citing *Fitzpatrick v. New Albany, etc. R. Co.*, 7 Ind. 436. It was held in the case cited and in *Gillenwater v. Madison, etc., R. Co.*, 5 Ind. 339, 61 Am. Dec. 101, that a railroad company is liable to an employee for an injury occasioned by the negligence of other employees of the

company where the duties of the latter, in connection with which the injury happens, are not common or in the same department with those of the injured servant. Those cases, however, were overruled on this point in *Columbus, etc., R. co. v. Arnold*, 31 Ind. 174 183, 99 Am. Dec. 615, where it was said concerning said rule: "But this limitation of the exception of the company from liability in such cases is not recognized in any of the subsequent cases, and it is now settled in this state that the employer is not liable for an injury to one employee occasioned by the negligence of another engaged in the same general undertaking. *The O. & M. R. Co. v. Tindall*, 13

Ind. 366; *Slattery's Admr. v. The Toledo & W. R. Co.*, 23 Ind. 259 81; *The O. & M. R. Co. v. Hammersley*, 28 Ind. 371. In

Slattery's Admr. v. The Toledo & W. R. Co., *supra*, Worden, J., quotes with approbation from the decision in *Wright v. The N. Y. Central R. Co.*, 25 N. Y. 562, as follows: "Neither is it necessary, in order to bring a case within the general rule of exemption, that the servants, the one that suffers and the one that caused the injury, should be at the time engaged in the same operation or particular work. It is enough that they are in the employment of the same master, engaged in the same common enterprise, both employed to perform duties and services tending to accomplish the same general purposes, as in maintaining and operating a railroad, operating a factory, working in a mine, or erecting a building. The question is whether they are under the same general control." To the same effect is the case of *Manville v. The Cleveland, etc., R. Co.*, 11 Ohio St. 417, where it is said that "those employed in facilitating the running of the train by ballasting the track, removing obstructions, and those employed at stations attending to switches and other duties of a like nature upon the road, as well as those upon the trains operating, may all be well regarded as fellow-servants in the common service." In *Gormley v. Ohio, etc. R. Co.*, 72 Ind. 31, a laborer, whose duty was to assist in repairing the track, etc., while being carried to his work on a hand car, was killed by a collision with a freight train. His death was occasioned by the negligence

260 of the engineer in charge of the engine and said train. The court's attention was called to the cases of *Gillenwater v. Madison etc. R. co.*, *supra*, and *Fitzpatrick v. New Albany, etc. R. Co.*, *supra* and on page 33 it was said: "The cases cited by counsel were not overlooked, but were referred to and explained or disapproved in the later cases. *Slattery's Adm'r v. The T. & W. R. Co.*, 23 Ind. 81; *The Columbus, etc. R. Co. v. Arnold*, 31 Ind. 174; *Wilson v. The Madison, etc. R. Co.*, 18 Ind. 226; *the Pittsburgh, etc. R. Co. v. Ruby*, 38 Ind. 294 (10 Am. Rep. 111); *Sullivan v. The T. W. & W. R. Co.*, 58 Ind. 26. These later cases are certainly not consistent with the ground on which it is sought to have a right of recovery in the appellant. If a hardship results from the application of the rule that an employer is not liable to one employé for an injury caused by another employé engaged in the same general undertaking, it is more fitting that the Legislature be invoked to give a remedy than that this Court should undertake to introduce doubtful exceptions to a rule so clearly established." In *Evansville etc. R. Co. v. Barnes*, 137 Ind. 306, 310, 36 N. E. 1092, the rule as

stated in *Cleveland, etc., R. Co., v. Arnold, supra*, 159 Ind. 82, 85 64 N. E. 605, 59 L. R. A. 792, and cases cited; *Thacker v. Chicago, &c. R. Co.* 159 Ind. 82, and cases cited; *Thompson v. Citizens Street R. Co.*, 152 Ind. 461, 469, 53 N. E. 462, and cases cited; *Justice v. Pennsylvania Co.*, 130 Ind. 321, 30 N. E. 303; *Spencer v. Ohio, etc., R. Co.*, 130 Ind. 181, 184, 29 N. E. 915, and cases cited; *Clark v. Pennsylvania Co.*, 132 Ind. 199, 31 N. E. 808, 17 L. R. A. 811, and cases cited: *Capper v. Louisville, etc., R. Co.*, 103 Ind. 305, 261 2 N. E. 749; *Indiana Ry. Co. v. Dailey*, 110 Ind. 75, 79, 80, 10 N. E. 631, and cases cited; *Sullivan v. Toledo etc., R. Co.*, 58 Ind. 26, 27, 28; 1 *Woolen's Trial Proc.* §§ 350, 351; *Beach on Contributory Neg.* 331. It is clear under the cases cited that appellee, an employee of appellant, engaged in common labor upon its track was a fellow servant with those in charge of the passenger car.

It is a general rule in this state that employees, while being transported to and from their work on the cars of trains of their employers, are fellow-servants of those engaged in the same general undertaking, and, if injured, while being so carried by the negligence of a fellow servant, the employer is not liable therefor. *Bailey on M. & S.* pp. 283, 360, 361, and cases cited; *Ohio, etc. R. Co., v. Hammersley*, 28 Ind. 371; *Wilson v. Madison, etc. R. Co.*, 18 Ind. 226, 230, and cases cited; *Capper v. Louisville, etc., R. Co.*, 103 Ind. 305, 308, 309, 2 N. E. 749, and cases cited; *Ohio, etc., R. Co. v. Tindall*, 13 Ind. 366, 369, 74 Am. Dec. 259, and cases cited; *Gormley v. Ohio, etc. R. Co.*, 72 Ind. 31; *Bowles v. Indiana Railway Co.*, 27 Ind. App. 672, 675, 62 N. E. 94; 87 Am. Rep. 279, and cases cited, *Ewald v. Railway Co.*, 70 Wis. 420, 36 N. W. 12, 591, 5 Am. St. Rep. 178; *Gilman v. Eastern R. Co.*, 10 Allen, 233, 87 Am. Dec. 635; *Gillshannon v. Stony, etc., R. Co.*, 10 Cush., 228; *Ryan v. Cumberland, etc. R. Co.*, 23 Pa. 384; *Vick v. New York, etc. R. Co.*, 95 N. Y. 267, 47 Am. Rep. 36.

262 The allegation that the work appellee was engaged in doing had no connection with, nor was in any — connected with or incident to, or a part of, the work or employment of the motorman or servants in charge of the passenger car, and the allegation that he was simply a passenger on the work car, and the allegation, that appellant owed him a duty, and was bound to carry him safely, are mere conclusions of the pleader, and are not admitted by the demurrer, and cannot control the special facts alleged, which show that he was a fellow-servant of those in charge of the passenger car. *Woolen's Trial Proc.* §1037. It is true that if an employee is injured by the negligence of a fellow-servant who is incompetent, and this incompetency is the proximate cause of the injury, the employer is liable therefor if he knew, or could by the exercise of ordinary care have known, of such incompetency, and the injured employee was not guilty of any negligence contributing to his injury, and did not know and could not have known of such incompetency by the exercise of ordinary care. For if an injured employee has knowledge of the incompetency of his fellow-servant by whose negligence he is injured, and enters the service with such knowledge, or continues therein after he obtains or could by the exercise of ordinary

care have obtained such knowledge, he assumes the risks incident to such incompetency. Lake Shore, etc. R. Co. v. Stupak, 108 Ind. 1, 5, 6, 8, N. E. 630, and cases cited; Louisville, etc. R. Co., v. Sanford, 117, Ind. 265, 266-269, 19 N. E. 770, and cases cited; Indianapolis, etc. R. Co., v. Watson, 114 Ind. 20, 25, 27, 14 N. E. 721, 15 N. E. 824, 5 Am. St. Rep. 578, and cases cited; Indiana, etc. R. Co., v. Dailey, 110 Ind. 75, 81, 82, 10 N. E. 631; Louisville, etc. R. Co., v. Kemper, 147 Ind. 561, 565-567, 47 N. E. 214, and cases cited; Kroy v. Chicago, etc., R. Co., 32 Iowa, 357; 1 Woolen's Trial Proc. 1347, 1348, 1352. No such facts were alleged in said paragraph. It follows that the court erred in overruling the demurrer to the first paragraph of the amended complaint.

The second paragraph of the amended complaint alleges that appellee's injury was caused by the negligence of the employee in charge of the switch in opening the same so as to allow the passenger car to enter thereon and collide with the work car. Conceding, without deciding, that this paragraph sufficiently charges the incompetency of the person in charge of said switch and appellant's knowledge thereof, it is not alleged that appellee did not know of such incompetency before the injury. For want of allegations negating such knowledge on the part of appellee the paragraph was clearly insufficient. It is alleged in said paragraph that appellee was injured "without any fault or negligence on his part," but this

264 does not take the place of averments showing that the risk of the incompetency of the person in charge of the switch was not knowingly assumed as an incident of his service. Louisville, etc. R. Co. v. Corps, 124 Ind. 427, 428, 24 N. E. 1046, 8 L. R. A. 636; Peerless Stone Co. v. Wray, 143 Ind. 574-575, 42 N. E. 927; Cleveland, etc. R. Co. v. Parker, 154 Ind. 153, 56 N. E. 86, and cases cited; Bowles v. Indiana R. Co. 27 Ind. App. 672, 676, 62 N. E. 94; 87 Am. St. Rep. 279, and cases cited; Woolen's Trial Proc. 1347. The third paragraph of the amended complaint is founded upon the second subdivision of section 7083, Burns' Rev. St. 1901. (section 5206s, Horner's Rev. St. 1901), which provides: "That every railroad * * * shall be liable for damages for personal injuries suffered by any employee while in its service, the employee so injured being in the exercise of due care and diligence. * * * Second. Where such injury resulted from the negligence of any person in the service of such corporation, to whose order or direction the injured employee at the time of the injury was bound to conform and did conform." In order to make a good complaint under this subdivision, it is necessary to allege, among other things, that the injured employee was conforming to the order or direction of some person in the service of the corporation to whose order or direction he was bound to conform and did conform, and that while conforming

265 to such order or direction he was injured by the negligence of the employee to whose order he was conforming. Thacker v. Chicago, etc. R. Co., 159 Ind. 82, 90-93, 64 N. E. 605, 59 L. R. A. 792; Louisville, etc., R. Co. v. Wagner, 153 Ind. 420, 53, N. E. 927; American Rolling Mill Co. v. Hullinger (No. 20,100) 69 N. E. 460. It is alleged in said paragraph that on the 27th of May, 1901, appellee was in the service of appellant as a common laborer, and was directed by appellant to enter one of its cars about

one mile west of Philadelphia for the purpose of being carried by appellant to the city of Greenfield; that appellee was bound to conform to the order and direction aforesaid, and that while on said car appellant negligently and carelessly ran one of its other cars into and caused the same to collide with the car which appellee had entered, whereby he was injured, etc. This paragraph is clearly insufficient. It is not shown that the employee by whose negligence he was injured was the one to whose order or direction he was bound to conform and was conforming when injured. Proof that appellee was injured while conforming to the order or direction of one employee, to whose order and direction he was bound to conform, and that his injury was caused by the negligence of another co-employee, who had no such authority, would sustain said allegations of the third paragraph, but would not make a case under said second sub-
266 division of section 7083, *supra*. In the fourth paragraph it is alleged that appellee, a laborer in the service of appellant, was directed to enter said work car for the purpose of being carried to Greenfield, and was thence carried to a siding; that at the time and place "where said car was sidetracked the switch was placed by appellant in charge of one of its servants, who then and there negligently and carelessly operated said switch so that another car of appellant ran into the same and collided with great force and violence with the car on said switch in which appellee was then riding, whereby he was injured, etc. * * * That said servant of appellant in charge of said switch as aforesaid was at the time and place acting in the place and performing the duties of said appellant, and that appellee was then and there obeying and conforming to the order of appellant, at the time of such injury." It is evident from what we have already said that the allegations of said paragraph are not sufficient to avoid the effect of the common-law rule that an employee cannot recover for injuries caused by the negligence of a fellow-servant. It is also clear from what was said in regard to the third paragraph that a cause of action is not stated under the second subdivision of section 7083, Burns' Rev. St. 1901, a part of the employers' liability act of 1893. Neither does the allegation
267 concerning the negligence of the person in charge of the switch state a cause of action under the fourth subdivision of the employer's liability act for no liability is created by said subdivision for injuries caused by the negligence of persons in charge of a switch. *Baltimore, etc. R. Co. v. Little*, 149 Ind. 167, 48 N. E. 862. It is a well-settled rule that when a party seeks the benefit of a statute he must by averment and proof bring himself within its provisions. *American Rolling Mill Co. v. Hullinger* (this term) 69 N. E. 460; *Hodges v. Standary Wheel Co.*, 152 Ind. 680, 693, 52 N. E. 391, 54 N. E. 383; *Porter v. State*, 141 Ind. 488, 490, 40 N. E. 1061; *Weir v. State ex rel. Wohl* (this term) 68 N. E. 1023, 1024; *Goodwin v. Smith*, 72 Ind. 113-116; *Van Sickle v. Belknap* 129 Ind. 558, 559, 28 N. E. 305; *Jackson School Tp. v. Farlow*, 75 Ind. 118, 120, 121; *Potts v. Felton*, 70 Ind. 168, 169; *Blanchard v. Wilbur*, 153 Ind. 387, 392, 55 N. E. 99; *Massey v. Dunlap*, 146 Ind. 350, 354, 335, 44 N. E. 641; *Chicago etc. R. Co., v. Vert*, 24 Ind. App. 78, 81, 56 N. E. 139; *Baltimore, etc. R. Co. v. Harmon* (Ind. Sup.) 68 N. E. 589; *Toledo, etc., R. Co., v. Long* (Ind. Sup.) 67 N. E. 259;

Chicago, etc. R. Co. v. Glover, 159 Ind. 166, 169, 62, N. E. 11. Said third and fourth paragraphs wholly fail to bring appellee within any of the provisions of the employer's liability act of 1893.

The fifth paragraph of complaint is predicated upon common-law liability, and proceeds upon the theory that the injury complained of was caused by the negligence of a motorman in the service of appellant, who was a reckless and incompetent motorman, and was known to be such by appellant long before the collision in which appellee was injured. It is not alleged in said paragraph that appellee had "no knowledge of the recklessness and incompetency of the motorman." Such an allegation is essential to the sufficiency of a paragraph predicated upon the incompetency of a fellow servant. True, it is alleged that the passenger car in charge of the motorman "collided with the car in which appellee was riding, whereby appellee, without any fault or negligence on his part, and without any knowledge of the careless and reckless conduct of said motorman in operating his said car, was thrown with great force and violence forward in said car," and thereby injured. The allegation that appellee was "without any knowledge of the careless and reckless conduct of said motorman in operating said car" means only that he had no knowledge of the careless and reckless manner in which the motorman was operating his car at the time of the collision. This is not equivalent to an allegation that appellee at and before the time of his injury had no knowledge of the recklessness and incompetency of the motorman. Lake Shore, etc., R. Co. v. Stupak, 108 Ind. 1, 5, 8 N. E. 630. The averment of the want of knowledge on the part of the injured employee must be as broad as the allegation of knowledge on the part of the employer. The Peerless Stone Co. v. Wray, 143 Ind. 574-577, 42 N. E. 927. We have already shown that an allegation that appellee was without any fault or negligence on his part does not supply the place of averments showing that the risk of the incompetency of the motorman was not voluntarily assumed as an incident of his service.

It is alleged as against appellant in the sixth paragraph that appellee was in the service of appellant constructing a spur track from appellant's main line to Spring Lake, "and was and had been carried by defendant (appellant) from his home in Greenfield to and from his place of employment; that for the carrying of said plaintiff and his co-laborers to and from the point aforesaid the defendant had furnished a work car propelled by electricity; that it was so old and so negligently constructed and equipped that it could not be operated on the defendant's main line without great danger of collision with the other cars of defendant running between stations, or delaying the same in making their schedule time; that at the close of plaintiff's day's work and on said day he was ordered, directed, and invited by the defendant, by and through its authorized agents and employees, to enter into and upon said work car, to be carried from his place of employment to his said home in Greenfield aforesaid; that by reason of the said order, direction, and invitation of the defendant aforesaid, and directed and inducted thereby, the plaintiff entered into and upon said car for the purpose of being carried as aforesaid to his said home aforesaid; that said car proceeded upon

its course upon defendant's main track for some distance towards the said town of Greenfield, whereupon (by reason of its defective construction and equipment thereof) the defendant and its employees (were compelled to and did) run said car into and upon a side track of the defendant connecting with its main line to permit an incoming car to pass the same, and while said car was standing upon said track, and while the plaintiff was lawfully and rightfully in and upon said car for the purpose of being carried to his home aforesaid, the defendant negligently and carelessly by and through the negligence of its motorman, officers, agents and employees in the control, management and direction of said cars and the switchman in charge of said switch, and by reason of its negligent and defective rules and mode of keeping knowledge of and directing its cars, run another car with a speed of thirty miles per hour into and upon said switch, and into and upon the said car in which the plaintiff was situated as aforesaid and upon, into and against the plaintiff—all without any fault or negligence of the plaintiff in any particular whatever." It cannot be held that said paragraph shows that appellant had failed to exercise ordinary care in "establishing and promulgating its rules, or in the mode of keeping knowledge of and directing its cars." There are no direct averments to that effect. More-

271 over, said allegations are mere conclusions of the pleader stated by way of recital. Facts, not conclusions, must be averred; and they must be pleaded directly and positively. It avails nothing as against a demurrer to aver conclusions or to plead facts by way of recital. *Nysegander v. Bowman*, 124 Ind. 584, 590, 24 N. E. 355; *Weir v. State ex rel.* (Ind. Sup.) 68 N. E. 1023, 1024, and cases cited; *Roberts v. Lovell*, 38 Wis. 211, 215 Bliss on Code Pleading (3d Edition) 318. In determining the sufficiency of said paragraph, therefore, we must eliminate the allegation in regard to "negligent and defective rules" and "mode of keeping knowledge of and directing their cars." If the negligent construction and equipment of the work car and the alleged great danger of operating it on the main line were the proximate cause of the injury, the same would be insufficient, because it is not alleged that appellee had no knowledge of the negligent construction and equipment of said work car, and the consequent danger of collision with other cars. In other words, to be sufficient on the ground of the negligent construction, etc., of the work car, the allegations must show that he has not assumed the risks incident to the defective construction of the work car of which he complains. It is evident, however, that the proximate cause of appellee's injuries was the running of another car "into and upon said work car," and not the negligent construction and equipment of said work car. What is alleged in regard

272 to the age and negligent construction and equipment of the work car, and the danger of operating it on the main line, may therefore be disregarded.

Disregarding the conclusions, recitals and allegations mentioned, said amended sixth paragraph charges that appellee's injuries were caused by the negligence of those "in control, management, and direction of" the work car and the car which ran into it. The per-

sons in charge of said cars, as we have already shown, were, regardless of the names or titles by which they were designated, fellow-servants of appellee, and, if appellee was injured by their negligence as alleged, appellant was not liable therefor. It is a well-settled rule in this state that an employee who knows, or by the exercise of ordinary care could know, of any defects or imperfections in the place, ways, machinery, appliances, tools, or other things about which he is employed, or the want of capacity or the negligent habits of a fellow-servant, and continues in the service without objection and without a promise of change is presumed to have assumed the risks resulting from such defects or imperfections or fellow-servant's want of capacity or negligent habits, and cannot recover for injuries caused thereby. The rule does not require that the employé search for latent defects in the ways, machinery, appliances, tools, or other things about or with which he works, or the hidden dangers of the place where he is engaged in the line of his duty, but it goes to the extent that he

273 assumed the consequences resulting from such defects as are patent, and such as are known to him, and such as by the exercise of ordinary care he could discover. *Wabash R. Co. v. Ray*, 152 Ind. 392, 400, 401, 51, N. E. 920. It has been uniformly held, therefore, that in an action by an employee against his employer for injuries received while in his employment, a complaint, to be sufficient, must allege that he had no knowledge of such defects or imperfections, or fellow-servants' want of capacity, or negligent habits; and if he have such knowledge he must allege facts which show a sufficient reason for continuing in such employment. 1 *Woolen's Trial Proc.* 1350, 1352, and cases cited; *Stone v. Bedford Quarries Co.*, 156 Ind. 430, 60 N. E. 35; *Hall vs. Bedford Quarries Co.*, 156 Ind., 460, 60 N. E. 149; *Cleveland, etc., R. Co. v. Parker* 154 Ind. 153, 56 N. E. 86, and cases cited; *McFarlan Carriage Co. v. Potter*, 153 Ind. 107, 53 N. E. 465; *Consolidated Stone Co. v. Summit* 152 Ind. 297, 299, 300, 53 N. E. 235; *Louisville etc., R. Co., v. Kemper*, 147 Ind. 561 47 N. E. 214 and cases cited; *Peerless Stone Co. v. Wray*, 143 Ind. 574-577, 42 N. E. 927, and cases cited; *Boone's Code Pleading*, §169. Under this rule none of the paragraphs of the complaint states facts sufficient to constitute a cause of action at common law.

While it is sufficient to allege in the complaint a want of knowledge on the part of the injured employee, to sustain such allegation the evidence must show that the injured employee not only had no knowledge of the defect or imperfection in the machinery, appliances, tools, or other things about which he was employed, 274 or of the fellow-servant's incompetency or recklessness complained of, but could not have had such knowledge by the exercise of ordinary care. *Consolidated Stone Co. v. Summit*, 152 Ind. 297, 299, 300, 53 N. E. 235, and cases cited. In an instruction to the jury, however, it is error to say that want of knowledge on the part of the injured employee will enable him to recover against his employer, for this limits the employee's assumption of risk to things of which he has actual knowledge. If he had such knowledge, or could have had by the exercise of ordinary care, he cannot recover.

It is error, therefore, in instructions to the jury to limit the injured employee's knowledge to actual knowledge; for implied knowledge, such as could have been acquired by the exercise of ordinary care, has the same force and effect as actual knowledge. *Pennsylvania Co. v. Ebaugh*, 152 Ind. 531, 533-535, 53 N. E. 763, and cases cited; *Chicago, etc., R. Co. v. Glover*, 159 Ind. 166, 62 N. E. 11, and cases cited. For this reason two of the instructions given to the jury were erroneous.

As none of the paragraphs of complaint states a cause of action under the employer's liability act of 1893 (section 7083, Burns Rev. St. 1901), it is unnecessary to decide whether or not said act, or any part thereof, applies to street and interurban railroads. For a discussion of this question, see *Sams v. St. Louis, etc., R. Co. (Mo.)* 73 S. W. 686, 61 L. R. A. 475; *Savannah, etc. Co. v. Williams (Ga.)* 43 S. E. 751, 61 L. R. A. 249; *Dresser's Employer's Liability Act*, §80, pp. 349, 350, and cases cited. Other questions are argued, but as they may not arise on another trial of the cause, they are not considered.

Judgment reversed, with instructions to sustain appellant's demurrer to each paragraph of the amended complaint.

276 (Defendant then rested.)

SPENCER MELTON recalled in his own behalf by his attorneys and testifies as follows:

1. It is testified to here by Mr. Shrodes that in your presence and hearing he gave some kind of warning to you against getting under that bent, or to the men generally concerning the bent, or said be careful you never know when an accident may happen; was any such thing said or any such warning given or anything in substance given there or said by Mr. Shrodes on that occasion or on any occasion?

(Defendant objects.)

By the COURT: Leave out your statement about what Mr. Shrodes testified; ask him a direct question.

2. Did Mr. Shrodes on the occasion of this day or the day before when you were injured warn you not to get under that bent, or warn any of the men in your presence not to get under that bent, or say to you or any of these men in your hearing be careful we never know when an accident may happen, or in substance that?

(The defendant objects upon the ground that it should have been offered in chief, and the court overrules that objection and permits the witness to answer, to which defendant excepts.)

A. No, sir.

(Plaintiff rests.)

277 At the conclusion of all the evidence the defendant moved the court to peremptorily instruct the jury to find their verdict for each and all of these reasons, namely:

First. There is no evidence of actionable negligence.

Second. The Indiana Statute upon which this action is based does not apply to the facts proven.

Third. In so far as the terms of the Indiana Statute applies in this action, covering the facts of this case, they are unconstitutional and void; they are discriminatory against defendant and deny it the equal protection of the laws; they are violative of the constitution of Indiana and of section one article 14 of the constitution of the United States guaranteeing to the defendant the equal protection of the laws.

Fourth. The Indiana Statute upon which this action is based was not intended to be enforced outside of the State of Indiana and its enforcement in a Kentucky forum is against the policy of the State of Kentucky.

The Court overrules the motion on each and all of the grounds, to which defendant in each and every instance excepts.

278 STATE OF KENTUCKY, *County of Hopkins:*

I, B. N. Gordon, Official Stenographer for the Hopkins Circuit Court, certify that I took short hand notes of the evidence on the trial of the foregoing case of Spencer Melton *vs.* the Louisville & Nashville Railroad Company; that I thereafter made a complete, fair, impartial and correct transcript of same; that the foregoing transcript of evidence contains all the evidence heard upon said trial; all the objections made thereto; all the rulings of the court thereon, and all the exceptions taken thereto.

Given under my hand this the 14th day of December, 1906.

B. N. GORDON,

Official Stenographer.

STATE OF KENTUCKY, *County of Hopkins:*

I, J. F. Gordon, Judge of the Hopkins Circuit Court and who presided on the trial of the foregoing case of Spencer Melton *vs.* The Louisville & Nashville Railroad Company, certify that the foregoing transcript of evidence contains all the evidence heard on said trial; also contains all the objections made thereto; all the rulings of the court thereon; and all the exceptions taken thereto; and that said transcript is correct.

Given under my hand this 14th day of December, 1906.

J. F. GORDON,

Judge of Hopkins Circuit Court.

279 And with said transcript there was filed a map, and which is as follows:

(Here follows map marked page 280.)

And with said transcript there was also filed a statement, and which is in words and figures as follows, to-wit:

Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,

vs.

SPENCER MELTON, Appellee.

Statement.

The names of the parties to this appeal are as stated in the caption. The judgment appealed from was rendered on November 1, 1906, and is to be found on page 31 of the record. The appeal was granted below, and no summons or warning order is desired.

WADDILL & DEMPSEY,

BENJAMIN D. WARFIELD,

Counsel for Appellant.

Be it remembered that at a Court of Appeals held at the Capitol at Frankfort on the 17th day of May, 1907, the following order was entered to-wit:

L. & N. R. R. Co.

v.

MELTON.

Hopkins.

This case is ordered to be submitted.

And afterwards at a Court of Appeals held at the Capitol at Frankfort on the 21st day of May, 1907, the following order was entered, to-wit:

L. & N. R. R. Co.

v.

MELTON.

Hopkins.

Came the appellee by counsel and moved the Court to set aside the order of submission herein, and to pass case, which motion is submitted.

And afterwards at a Court of Appeals held at the Capitol at Frankfort on the 22nd day of May, 1907, the following order was entered, to-wit:

L. & N. R. R. Co.

v.

MELTON.

Hopkins.

The Court being sufficiently advised, the order of submission entered herein is set aside, and said case is ordered passed.

And afterwards at a Court of Appeals held at the Capitol at Frankfort on the 6th day of June, 1907, the following order was entered, to-wit:

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L. & N. R. R. Co.

vs.

MELTON.

Hopkins.

This case is ordered to be submitted.

And afterwards at a Court of Appeals held at the Capitol at Frankfort, on the 19th day of November, 1907, the following Judgment was entered, to-wit:

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,

vs.

SPENCER MELTON, Appellee.

Appeal from the Hopkins Circuit Court.

The Court being sufficiently advised, it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed, and that the appellee recover of the appellant 10 per cent. damages on the amount of the judgment superseded herein which is ordered certified to said court.

It is further considered that the appellee recover of the appellant his costs herein expended.

And on said date the Court delivered the following opinion:

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Court of Appeals of Kentucky.

Nov. 19, 1907—to be Reported.

LOUISVILLE AND NASHVILLE RAILROAD CO., Appellant,
vs.

SPENCER MELTON, Appellee.

From the Hopkins Circuit Court.

Opinion of the Court by Judge HOBSON:

Spencer Melton was a carpenter in the service of the Louisville & Nashville Railroad Company and on March 2, 1905, was engaged in building a coal chute on the railroad tracks near Howell, Ind., working under a foreman named Shrode. In building the coal chute it became necessary to set up some bents, weighing about 1200 pounds each and 22 feet long. To raise up the bents they used a pulley, block and tackle; the bent was raised by the hands pulling on the rope. The pulley was fastened to a square beam by an iron chain similar to those used for locking a wagon. The bent was too heavy for the men to carry it up at once. They would surge upon the rope and thus lift it a little, and then after catching their breath, would surge again. To prevent the bent from going back when thus lifted up, Melton, by the direction of the foreman, got a piece of timber and propped the bent to hold it at the height to which it had been raised when the men made a surge. The foreman had a similar piece of timber and propped the bent on the opposite side from Melton. While they were thus engaged in raising the bent, the chain which held the pulley broke, the bent fell catching Melton under it and smashing him down upon other timbers, fracturing one leg at the knee, the other at the hip, breaking the ribs on one side and also breaking his back. By reason of his injuries he was paralyzed from his waist down. The bowels and bladder have to be moved with an instrument. His virility is destroyed. He has no feeling in the right leg or use of it, and the left is but little better. He was then a healthy young man weighing 145 pounds; now he weighs 116 pounds. His suffering for six or eight weeks was very intense, and since then, while he has not suffered so much, he is never free from pain. The pain in his back is continuous.

He was treated in sanitariums at Chicago, St. Louis and Evansville, as well as by local doctors at his home. The testimony of the physicians show that his injuries are permanent. In this suit brought by him to recover for his injuries, the jury found for him and fixed his damages at \$22000.00. The court entered judgment upon the verdict and the Railroad Co. appeals.

The action was brought under a statute of Indiana, which so far as material is as follows:

“An Act regulating liability of railroads and other corporations, except municipal, for personal injury to persons employed by them, fixing the rules of evidence which shall govern in such cases, and providing that the decisions or statutes of other states shall not be pleaded or proven as a defense in this state: Provided further, that its provisions shall not apply to any injuries sustained before it takes effect, nor in any manner any suits or legal proceedings pending at the time it takes effect, and declaring an emergency. (Approved March 4, 1893.)

SECTION 1. Be it enacted by the General Assembly of the State of Indiana, that every railroad or other corporation except municipal operating in this state, shall be liable in damages for personal injury suffered by any employé while in its service, the employé so injured being in the exercise of due care and diligence, in the following cases:

First. When such injury is suffered by reason of any defect in the condition of ways, works, plants, tools and machinery connected with or in use in the business of such corporation, when such defect was the result of negligence on the part of the corporation, or some person entrusted by it with the duty of keeping such way, works, plant, tools or machinery in proper condition.

Second. Where such injury resulted from the negligence of any person in the service of such corporation, to whose order or direction the injured employé at the time of the injury was bound to conform and did conform.

SEC. 4. In case any railroad corporation which owns or operates a line extending into or through the state of Indiana and into or through another or other states, and a person in the employ of such corporation, a citizen of this state, shall be injured as provided in this act, in any other state where such railroad is owned or operated, and a suit for such injury shall be brought in any of the courts of this state, it shall not be competent for such corporation to plead or prove the decisions or statutes of the state where such persons shall have been injured as a defense to the action brought in this state.”

It is insisted for the Railroad Company that the act is unconstitutional in this that it applies to corporations and does not apply to individuals whose employes may be injured. The Supreme Court of Indiana has construed the statute only to apply to railroad companies, it is held that it applies to all persons, whether natural or artificial, operating a railroad, and that it does not apply to any other business. The United States Supreme Court has affirmed the constitutionality of the statute basing its judgment upon the construction of the statute given by the Supreme Court of Indiana. (*R. R. Co. v. Montgomery* 152 Ind. 1, *Tullis v. R. R. Co.* 175 U. S. 348, *R. R. Co. v. Lightheiser* 78 N. E. 1033. Indianapolis etc. *R. R. v. Houlihan* 54 L. R. A. 787, *Bedford Quarries Co. v. Bough* 80 N. E. 529.)

It is earnestly insisted that while the act is constitutional under these rulings as to those operating a railroad it can not be held constitutional as to a carpenter; that the state may not establish a rule

for carpenters in the service of a railroad and another rule for carpenters in the service of other people. We are unable to see the force of this distinction. A railroad cannot be run without bridges; 288 bridges cannot be built without carpenters. The work of a bridge carpenter on a railroad is perhaps no less perilous than the work of an operative on one of its trains. Coal tipples are no less essential to the operating of a railroad than bridges because the engines cannot be operated without coal. The construction of a coal tipple is therefore essential to the operating of a railroad. As has been well said, the Legislature cannot well provide for all subjects in one act. Legislation must necessarily be done in detail and an act regulating railroads violates no constitutional provision because it is made to apply only to railroads.

(Indianapolis etc. R. R. Co. *v.* Kane 80 N. E. 841, Schoolcrafts Admr. *v.* L. & N. R. R. Co. 92 Ky. 233, Chicago etc. R. R. Co. *v.* Stahley 62 Fed. 363, Callahan *v.* R. R. Co. 170 Mo. 473, 194 U. S. 628, R. R. Co. *v.* Ivy 73 Ga. 504.)

The defendant also insisted that the act cannot be enforced in this state because it provides that the decisions and statutes of other states shall not be read or considered in the courts of Indiana. It is said that the statutes of Indiana are only considered in this state by comity, and that it will not be enforced in this state when the courts of Indiana do not treat the Kentucky statutes and decisions with like comity. The section in question has been held unconstitutional by the courts of Indiana.

(Baltimore and Ohio S. W. R. Co. *vs.* Reed, 158 Ind. 25.)

289 But aside from this, when the plaintiff was injured at Howell Ind., a cause of action accrued to him; and this cause of action which there accrued to him he is seeking to enforce by this action. The rights of the parties must depend on the facts as they then existed. The cause of action which Melton then had the courts of Kentucky will enforce. We have no doubt the courts of Indiana do the same as to a cause of action accruing here. But if they did not, the fact that they did not administer justice would be no reason why this court should deny justice to a litigant here. No reason of public policy exists why the courts of this state should be closed to a citizen of this state seeking to enforce a meritorious cause of action.

The proof on the trial on behalf of the plaintiff showed that the chain was not the proper one for the work in which it was used; that it was supplied by the foreman and that he had ordered the men to use it. The proof also showed that the chain was a defective one of its kind and that this might have been discovered by an ordinary examination of it. The broken link has been brought to this court with the record and an examination of it indicates that the iron was not properly welded when the link was made. The plaintiff also showed that a chain of long links like this when put around a square sill is much more liable to pull in two at the corners of the 290 sill, where the strain would tend to pull the link open, than it would be if the chain was stretched straight and a direct strain

put upon it. The only expert who testified on the trial stated that the chain had a strength of 6000 pounds; that the rule was that a chain should have a strength six times as great if the strain was steady and sixteen times as great if it came by jerks. The weight of the bent here was greater than one sixth of the strength of the chain and in lifting the bent they put much more strain upon the chain than the weight of the bent, because the rope being at an acute angle to the bent, a large part of the power went against the ground at the foot of the bent; in addition to this the strain being by jerks, a much stronger chain was required especially as at the corners of the sill the strain would be great. It is apparent from an examination of the link brought here that the link pulled open. There was therefore proof that the master did not furnish the servant a reasonably safe appliance, and that by reason of the insufficiency of the appliance, the servant received the injuries sued for. The court properly refused to instruct the jury peremptorily to find for the defendant, and submitted the question of negligence to the jury.

The court among other things instructed the jury as follows:

291 "The court instructs the jury that if they believe from the evidence that the injury received by plaintiff, if any, was suffered by reason of any defect in the condition of works or tools connected with or in use in the business of the defendant, and that such defect if any, was the result of negligence on the part of the defendant's foreman of a construction crew with which plaintiff was working and who was a person entrusted by the defendant with the duty of keeping such tools or works in a proper condition, and that plaintiff was at the time he received such injury in the service of the defendant and was at the time in the exercise of due care and diligence, then the law is for the plaintiff and the jury shall so find."

2. "If the jury shall believe from the evidence that the injury to plaintiff, if any, resulted from the negligent orders, if any, of the foreman of the construction crew with which plaintiff was working, such foreman being then in the service of the defendant, and that plaintiff at the time was bound to conform and did conform to the orders or directions of such foreman, and the plaintiff himself was at the time an employé of the defendant, in its service, and was himself at the time in the exercise of due care and diligence, then the law is for the plaintiff and the jury will so find."

5. "The court instructs the jury that they can not in any event find for plaintiff, because they may believe from the evidence that the chain with which the hitch was made was not reasonably safe if they shall believe from the evidence such condition was unknown to defendant's foreman W. C. Shrode, and would not have been discovered by him by the exercise of ordinary care in time to have prevented the injury."

292 These instructions are in accord with the statute. The foreman ordered the men to use the chain; he ordered them to lift the bent with the block and tackle; he ordered Melton to get a piece of timber and prop the bent, and when Melton was obeying his order, in his presence and under his personal supervision the bent fell by reason of the breaking of the chain and injured him. We cannot see how

the jury could have been misled in any way by the instructions. The real question in the case was whether the chain was defective or an improper appliance and the court by the fifth instruction told the jury that they could not in any event find for the plaintiff on the ground that the chain was not reasonably safe, if Shrode did not know its condition and could not have discovered it by ordinary care. The instructions asked by the defendant so far as they were proper were embraced in those given by the court.

It is earnestly insisted that the verdict is palpably excessive and the result of passion and prejudice on the part of the jury. In a case like that before us where a young and healthy man has been made a complete wreck, so that life must be to him a burden, a living death, a much larger verdict may be sustained than in a case where the person is killed. The plaintiff was capable of earning something like \$3.00 a day. He was in the morning of life and might reasonably expect to increase his earning capacity as he rose in his business. But in view of his expectation of life at what he had then been making, the verdict is not so excessive as to strike one at first blush as the result of passion and prejudice when we consider the suffering that he endured and his helpless condition at the trial, when medical skill had done all that it could do for him. In other states a number of verdicts much larger have been sustained for injuries not so serious as those proved here. (Texas etc. R. Co. *vs.* Kelley 80 S. W. R. 1973, Fonda *v.* St. Paul City Ry. Co. 79 N. W 1043, Pittsburg etc. Ry. Co. *v.* Simmons 70 N. E. 911, Scullin *v.* Wabash R. Co. 83 S. W. 860, Alberti *v.* New York etc. R. Co. 23 N. E. 35, Retan *v.* Lake Shore etc., Ry. Co. 94 Mich. 146, 53 N. W. 1094, Smith *v.* Whittier (Cal.) 30 P. R. 529, Philipps *v.* London etc., R. R. Co. 42 L. T. R. 6.)

There was no substantial error in the admission or rejection of evidence. The persons admitted as experts were qualified to testify as such. The weight of their evidence was for the jury. On the whole record we see no error to the prejudice of defendant's substantial rights.

Judgment affirmed.

Gordon, Gordon & Cox, Clay & Clay, For Appellee.

Benjamin D. Warfield, Waddill & Dempsey, For Appellant.

294 And afterwards at a Court of Appeals held at the Capitol at Frankfort, on the 20th day of December, 1907, the following order was entered, to-wit:

L. & N. R. R. Co.

v.

MELTON.

Hopkins.

Came the appellant by counsel and filed a petition, and moved the Court to grant a rehearing, which motion is submitted.

The petition named in the foregoing order is in words and figures as follows, to-wit:

295 Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
 SPENCER MELTON, Appellee.

Appellant's Petition for Re-hearing.

If the constitutionality of the Employers' Liability Statute of Indiana, upon which appellee predicated his right to recover in this action, can be upheld as to him, it is difficult to see where the line is to be drawn as to an employé of a railroad company. Yet, that the line must be drawn is conceded by all the authorities.

The Supreme Court of the United States in *G. C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, held that it was obvious from a mere inspection of the statute there under investigation that railroad corporations, against whom alone the statute was directed, were denied the equal protection of the laws. The court said:

"While good faith and a knowledge of existing conditions on the part of a Legislature is to be presumed, yet to carry that presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation is to
 296 make the protecting clauses of the Fourteenth Amendment a mere rope of sand, in no manner restraining State action.

"It is well settled that corporations are persons within the provisions of the Fourteenth Amendment of the Constitution of the United States (citing many cases). The rights and Securities guaranteed to persons by that instrument cannot be disregarded in respect to these artificial entities called corporations any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations. A State has no more power to deny to corporations the equal protection of the law than it has to individual citizens.

"But it is said that it is not within the scope of the Fourteenth Amendment to withhold from States the power of classification, and that if the law deals alike with all of a certain class, it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true (citing many cases), yet it is equally true that such classification can not be made arbitrarily. The State may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to

the act in respect to which the classification is proposed, and
 297 can never be made arbitrarily and without any such basis."

Again on page 159, the court said:

"But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Mathews, speaking for this court, in *Yick Wo v. Hopkins*, 118 U. S. 356, 369: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.' The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty, and the pursuit of happiness.' While such declaration of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests
 298 more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government."

And again on page 165 the court said:

"It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection. Tested by these principles, the statute in controversy can not be sustained."

Cotting v. Kansas City Stock Yards Company, etc., 183 U. S. 79, *Connelly v. Union Sewer Pipe Co.*, 184 U. S. 540, and *Ballard v. Mississippi Cotton Oil Co.*, 81 Miss., 507, 62 L. R. A. 407 are to the same effect.

The meaning and spirit of these cases, and of many others which might be cited, is that legislation can not be constitutionally enacted applying to a certain class of persons (and keeping always in mind that a corporation is a person within the meaning of the Fourteenth Amendment) that is not applied to any other class of persons, unless there is some reasonable ground for the classification. The Fourteenth Amendment to the Constitution of the United States is violated where a State Legislature attempts to enact legislation applicable only to one class of persons, unless there is, as was said in the
 299 *Ellis case*, "some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection" to sustain the attempted classification. If this is so, then how can the statute be

constitutionally applied in behalf of appellee, merely because he was working as a carpenter for a railroad company at the time he was injured, when he would have had no right to recover under the law of the State where he was injured, if he had not been working for a railroad company, but had received the same injuries in the same manner while doing the same kind of work for a corporation or individual other than a railroad? No authority for holding the Indiana statute constitutional as applied to Melton can be derived from *Tullis v. Lake Erie & Western R. Co.*, 175 U. S. 348. In that case, while the fact does not appear in the opinion of the Supreme Court, it does appear in the report of the case as decided by the United States Circuit Court of Appeals for the Seventh Circuit, 105 Fed. 554, that Tullis was employed as a freight train brakeman, and was injured while so employed, and while riding in the cupola of a caboose, by the negligence of the engineer of a pusher engine which was to push Tullis' train over a steep part of the railroad, and which engine so violently collided with the caboose as to throw it from the track.

In *P., C. & St. L. R. Co. v. Montgomery*, 69 L. R. A. 875, 152 Ind. 1, 49 N. E. 582, referred to in the opinion of the Supreme Court of the United States in the Tullis case, the injured employé was a freight brakeman, and while making a coupling between two cars was injured by the negligence of the engineer in reversing his engine without a signal. Both Tullis and Montgomery, therefore, were admittedly engaged in an extra-hazardous employment, and in holding the statute constitutional as to them, the liability of the railroad company was made to depend upon the character of employment, and not upon the character of the employer. But to hold the statute to apply to Melton, the decision is bound to be predicated upon the character of the employer, and not upon the character of the employment. The work he was doing was ordinary carpenter's work. It was no more dangerous to him because he was employed by a railroad company to do the work than it would have been if he had *have* been employed by a corporation other than a railroad company, or by an individual, to do it. Still, on authority of *Bedford Quarries Co. v. Bough*, 80 N. E. 529, if Melton had been doing exactly the same character of work for a corporation other than a railroad company, or for a non-corporate employer, the statute could not have been constitutionally applied, because the court held that it was void as to all other corporations except railroads, and as to all persons not incorporated, except the owners or operators of railroads. The court furthermore said in the Bough case that the only ground upon which the Legislature has the right to single out corporations or persons operating railroads, and impose upon them a liability which is not imposed upon other corporations or persons is that the operation of a railroad is an extra-hazardous business, and that, therefore, the statute can apply only to that part of the business of operating a railroad which is extra-hazardous.

There are certain hazards which may be said to flow naturally and peculiarly from the operation of railroads, growing out of the use of the highly dangerous agency of steam transportation, the speed at which trains are run, the dangers inseparably incident to coupling and uncoupling cars, to the movements of

engines and cars (especially in switch yards), to defects in equipments and tracks.

Down to the time the statute was enacted the fellow-servant doctrine, as applied in Indiana, precluded recoveries against railroad companies, and other employers of labor, in the great majority of cases of injury, in the character of cases above indicated and in others. The primary and controlling object of the statute, as declared in some of the cases decided by the Supreme Court of Indiana construing it, was to mitigate the supposed hardship of the common law rule of fellow-servants as theretofore declared by the courts of that State. The Supreme Court of the United States in the *Tullis* case held that the Indiana statute was practically the same as the statutes of Kansas, Iowa, and Ohio. Since the decision of the *Tullis* case, the Indiana statute has been construed in a large number of cases in the Supreme Court of that State, but we can find no case decided by that court in which the statute has been stretched to the point it has been stretched by this court in holding it applicable to the *Melton* case. That some of the Indiana decisions, applying the statute, would not have been upheld by the Supreme Court of the United States, for the reason that as so applied the statute violated the Fourteenth Amendment, we have no doubt.

Between the time the *Montgomery* case was decided and the time the *Bough* case was decided, a number of cases went to the Supreme Court of Indiana, in which recoveries were sought, under the statute, against corporations other than railroads. In most of those cases the court found a way to decide them adversely to the plaintiff. In a few of them it was held that a recovery might be had under the statute. The decisions in all of those cases, however,

302 were swept away by the opinion in the *Bough* case, which held that while the statute in terms applies not only to railroad companies, but to all corporations of the State, except municipal corporations, that it could not be constitutionally applied to any other class of corporations, except railroads, or to any other class of persons, except those owning and operating railroads, because, otherwise, the act would violate the Fourteenth Amendment to the Constitution of the United States.

In the previous case of *P., C. & St. L. R. Co. v. Lichteiser*, 78 N. E. 1033, the court held that the classification of railroads by themselves was proper because of the dangerous and hazardous character of the business of operating railroads; that the classification was based not on a difference in employers, but on a difference in the nature of the employment; that the character of the employer was not a controlling factor; that the basis for the classification of railroads by themselves was the hazardous and dangerous character of the employment of operating railroads; that this does not depend upon whether railroads are operated by corporations or by one or more persons; that the purpose of the statute, so far as railroads are concerned, was the protection of employes engaged in the dangerous and hazardous work of operating railroads. The confusion and inconsistency to be found in some of the previous opinions of the Supreme Court of Indiana, in which the constitutionality and interpretation of the statute were involved, were removed to a considerable extent

by the opinions in the Lightheiser and Bough cases, *supra*, and the rule to be deduced from those cases clearly is that the statute can only be constitutionally applied to those operating railroads, and as to them only as to those employes who are engaged in the

303 hazardous and dangerous employment of operating railroads.

This can only mean a hazardous and dangerous employment which is incident to the operation of railroads, but not incident to any other business. The statute as thus construed in the Lightheiser and Bough cases can only mean that the Legislature was of opinion that there were certain employments incident to the operation of railroads which were more hazardous than employments in any other business, and that this fact afforded a justification for applying the statute to railroads, but to no other corporations, and to no other persons except those owning and operating railroads. If this is so, then how can the statute be constitutionally applied to a carpenter who was not on or about a train, who was not on the railroad track, who was not engaged in loading or unloading material to or from cars, who was not even constructing or repairing a railroad bridge or trestle, but who was building a coal chute alongside of, but entirely off of, the railroad tracks? The work in which Melton was engaged at the time he was injured was not work at all peculiar to railroad operation. If he had been erecting a tobacco warehouse or a distillery, a barn or a dwelling house for a farmer, a bridge, a jail or poorhouse for a county, a store for a merchant, a factory for a manufacturer, a residence for an artisan, a hotel, an office building, a shop for a manufacturer, the statute would have given him no right of action for an injury received in precisely the same manner in which he received the injury of which he is complaining in this action. Yet, in his vocation as carpenter, he might just as

304 well have been injured while doing work, similar to that which he was doing for appellant, for any one of the classes or persons or corporations we have suggested, or for many others we might suggest.

The opinion of the court in this case seems to assume that the coal chute was to be used when completed for the purpose of supplying appellant's engines with coal. This may be true, or it may not be true. The testimony in the record on this subject is meager and unsatisfactory. There is certainly as much testimony in the record indicating that the work was being done solely for the Ingle Coal Co., and that the chute was not to be used for coaling engines for appellant, as that it was being built for appellant, and was to be used for coaling its engines. But conceding for the sake of argument that when completed the coal chute was to be used for the latter purpose, still that did not make appellant's employment a hazardous employment incident to the operation of the railroad.

The distinction was well drawn by Mr. Justice Brewer in an opinion written by him as a member of the United States Circuit Court of Appeals for the Eighth Circuit in *C., R. I. & P. R. Co. v. Stahley*, 62 Fed. 363, in which a Kansas statute, which the Supreme Court of the United States held in the *Tullis* case was practically the same as the Indiana statute, was held to apply to a workman in

a roundhouse who was injured while getting a locomotive ready for immediate use. Mr. Justice Brewer said:

"He was not engaged in repairing an old engine or constructing a new one, but in putting that engine, which had recently arrived, in condition for immediate use. He was * * * not
305 engaged in any outside work remotely related to the business of the company; he was not cutting ties on some distant tract to be used by the company in preparing its roadbed, not mining coal for consumption by the engines, nor even in the machine shops of the company, constructing or repairing its rolling stock; but the work which he was doing was work directly related to the movement of trains—as much so as that of repairing the track."

The work which Melton was doing in assisting in erecting the coal chute for the Ingle Coal Company certainly did not directly relate to the movement of trains. If it was work for the railroad company at all, it was merely outside work, remotely related to its business—as much so as cutting ties, mining coal, constructing or repairing rolling stock in a machine shop, as stated by Mr. Justice Brewer, and not, therefore, a character of work embraced by the statute.

Under all of the authorities which we have consulted on this point, and we have gone into the matter very fully, we think there can be no question that the only ground upon which the classification of railroad companies by the statute can be upheld is by limiting its application to cases of injury to employes of railroads who are engaged in work incident to the operation of railroads which is clearly more hazardous than any other work. If not so limited, then obviously the statute imposes a liability upon railroad companies growing out of the character of the employer, and not out of the character of the employment, and thereby comes within the condemnation of the Fourteenth Amendment.

The Supreme Court of the United States in the Tullis
306 case, as we have seen, held that the Indiana statute as construed by the Supreme Court in the Montgomery case was to be considered as practically the same as similar statutes of Kansas, Iowa, and Ohio. The Iowa statute was the pioneer statute on this subject. The Supreme Court of Iowa in *Deppe v. Chicago, etc., R. Co.*, 36 Iowa, 32, 55, in construing the statute of that State, held that if it should be so construed as to apply to all persons in the employment of railroad companies, without regard to the business they were employed in, it would clearly be class legislation, and would not apply upon the same terms to all in the same situation, and hence would be manifestly unconstitutional. Under the peculiar facts of the Deppe case, it was held that he was entitled to recover under the statute, but later in *Foley v. C., R. I. & P. R. Co.*, 21 N. W. 124, it was pointed out that, with the exception of the Deppe case, all of the cases in which that court had determined that railroad companies were liable under the statute were those where the injury was received by the movement of cars or engines upon tracks. Foley was injured while engaged in repairing a car on a side track. The Iowa court held that he was not entitled to recover under the statute.

In *Chicago, etc., R. Co. v. Pontius*, 157 U. S. 209, while the in-

jured employé was denominated a bridge carpenter, he was not so employed at the time he was injured. In answer to the contention that Pontius was a bridge builder; that the legislation only applied to employes exposed to the peculiar hazards incident to the use and operation of railroads; that the railroad company could not be subjected to any greater liability to its employes who were engaged in building its bridges than any other private individual or corporation engaged in the same business, etc., the Supreme Court said:

"But the difficulty with this argument is that the State Supreme Court found upon the facts that, although the plaintiff's general employment was that of a bridge carpenter, he was engaged at the time the accident occurred, not in building a bridge, but in loading timbers on a car for transportation over the line of defendant's road; and *Missouri Pacific Co. v. Haley*, 25 Kas. 35; *Union Pacific R'y v. Harris*, 33 Kas. 416, and *Atchison, Topeka, etc., Railroad Co. v. Koehler*, 37 Kas. 463, were cited, in which cases it was held that a person employed upon a construction train to carry water for the men working with the train, and to gather up tools and put them in the caboose or tool car; a section man employed by a railroad company to repair its roadbed and to take up old rails out of its track and put in new ones; and a person injured while loading rails on a car to be taken to other portions of the company's road, were all within the provisions of the act in question; and the court said: 'In this case the plaintiff was injured while on a car assisting in loading timbers to be transported over the defendant's road to some other point. The mere fact that the plaintiff's regular employment was as a bridge carpenter does not affect the case, nor does it matter that the road was newly constructed, nor whether it was in regular operation or not. The injury happened to the plaintiff while he was engaged in labor directly connected with the operation of the road, and the statute applies, even though it should be given the construction counsel places on it.'"

It seems to us the conclusion to be drawn from the foregoing language of the Kansas court, in which the Supreme Court concurred, is that if Pontius had been working as a carpenter on a bridge, or on the kind of work Melton was doing, he would not have been held to be embraced by the statute.

In *Missouri R'y Co., v. Mackey*, 127 U. S. 205, the employé was a locomotive fireman on a switch engine, and was injured in a collision between such engine and another switch engine, due to negligence of the engineer operating the other engine. The Supreme Court, after saying that "the only question for our examination, as the law of 1874 (Employers' Liability Act of Kansas) is presented to us in this case, is whether it is in conflict with clauses of the Federal Constitution" (*italics ours*) and after stating that "it is conceded that corporations are persons within the meaning of the (Fourteenth) Amendment," said: "But the hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employes as well as the safety of the public.

The business of other corporations is not subject to similar dangers to their employes and no objections, therefore, can be made to the legislation on the ground of its making an unjust discrimination."

An analysis of the Mackey opinion shows:

(1) That the court did not mean to go further than to uphold the Kansas Employers' Liability Act as applied to the facts of that case.

309 (2) That Mackey was unquestionably engaged in an extra-hazardous branch of the railroad service, and, therefore, the statute could well be sustained as to him, because of the character of the employment, and not because of the character of the employer.

(3) That, when so applied, the statute was not obnoxious to the rule declared in *G. C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, and in the *Cotting* and *Connelly* cases, *supra*.

Is not the inference clearly deducible from the Mackey case that if he had been injured while engaged in a branch of the railroad service, which was not extra-hazardous—if he had been engaged in the kind of work Melton was doing when injured—the statute would have been held void as to him?

As shown, on page 8 *et seq.* of our brief, out of 1,296,121 persons employed on all the railroads of the United States for the year ending June 30, 1904, only 253,834 were engaged in train and engine operations. The remaining 1,042,287 were otherwise employed. In short, less than 20 per cent. of railroad employes were engaged in the extra-hazardous branches of railroad service.

In *M. & St. L. Ry. Co. v. Herrick*, 127 U. S. 210, affirmed on authority of the Mackey case, Herrick, a brakeman, was injured while coupling an engine to a flat car, due to the negligence of the engineer. The Supreme Court upheld, as to Herrick, the Employers' Liability Statute of Iowa, similar to the Kansas statute involved in the Mackey case. Herrick was engaged in an extra-hazardous service. The classification as to him rested upon a difference which bore a reasonable and just relation to the act in respect to which the classification was proposed, and was not a mere
310 arbitrary selection. The same was true in the Mackey case.

In *Peirce v. Van Dusen*, 78 Fed. 693, the injured employe was a switchman, or yard brakeman, and while in the discharge of his duties as such was injured by the negligence of one Bartly, his conductor or foreman. Van Dusen was admittedly engaged in an extra-hazardous employment. It was held that he was entitled to recover under Laws, Ohio, 1890, p. 149, which statute was, as were the Kansas, Iowa, and Indiana statutes hereinabove referred to, intended to modify the common law doctrine of fellow-servants.

We have heretofore referred to *Bedford Quarries Co. v. Bough*, 80 N. E. 529, decided by the Supreme Court of Indiana, March 1, 1907. That case reviewed not only a number of the previous opinions of that court construing the statute, but also the opinions of the Supreme Courts of Minnesota, Iowa, and Kansas, the opinions of the Supreme Court of the United States in the *Ellis*, *Cotting*, and *Connelly* cases, and the other opinions of that court hereinabove referred to, construing the Indiana, Iowa, and Kansas statutes, and the court reached the conclusion, clearly stated in the opinion,

that the Indiana statute, while it had formerly been otherwise applied, must thenceforward be construed as applying only to corporations or individuals owning or operating railroads, and could not be applied to corporations other than railroads, or to individuals other than those owning or operating railroads, without violating the Fourteenth Amendment to the Constitution of the United States. The court held that the only ground upon which the Legislature has the right to single out corporations or persons operating railroads, and impose upon them liabilities which are not imposed upon other corporations or persons, is that the operation of a railroad is

311 an extra-hazardous business, and that, therefore, the act can apply only to that part of the business of operating a railroad which is extra-hazardous. The same view has been taken for many years by the Supreme Courts of Minnesota and Iowa construing similar statutes of those States. An interesting review of the Minnesota and Iowa decisions is to be found in *Jeeming v. Great Northern R. Co.*, 104 N. W. 1079. In order to keep this petition for rehearing within proper bounds we can not quote from the cases, as we would like to do. We shall urge the court, because of the great importance of the questions involved, to grant an oral argument on this rehearing, and if that is done, we will wish, in oral argument, to quote fully from and analyze the authorities.

We think there can be no question that the rule clearly deducible from the cases, and particularly from those last cited, is that no statute aimed at railroad companies alone can be held to be constitutional under the Fourteenth Amendment, unless the statute is limited in its application to persons who are specially exposed to those hazards which are peculiar to railroad operation—which obtain in the operation of railroads, but which do not obtain in non-hazardous employments. So construed, it seems to us to be beyond question that the Indiana statute can not be constitutionally applied in this case. The work Melton was doing was no more dangerous because he was doing it for railroad company than it would have been if he had been doing it for any other corporation or individual. In order to make the act apply to him, the decision must be rested upon the character of the employer, and not upon the character of the employment. This, as has been uniformly held, as far as we can find, is not sufficient to save the statute from the condemnation of the equality clause of the Fourteenth
312 Amendment.

In its opinion herein the court say that they are unable to see the force of the distinction contended for by appellant that it is not competent for a State Legislature to establish one rule for carpenters in the service of a railroad company and another rule for carpenters who do not work for railroads; that a railroad can not be run without bridges, and that bridges can not be built without carpenters. With due respect, we think the distinction is plain. In the first place, the court treats the case as one where a carpenter was injured in building a bridge. This is not correct. There is no pretense that Melton was engaged in building a railroad bridge at the time he was injured. He was assisting in the erection of a coal chute, which did not constitute any part of appellant's railroad, and

which was not on its right of way. Again, the court states that the work of a bridge carpenter on a railroad is perhaps no less perilous than the work of an operative on a train. Be this as it may, it is obviously no more dangerous than is the doing of similar work by a carpenter for any other employer. If this is so, then how can the Legislature constitutionally provide a liability as to a carpenter who works for a railroad company, when no such liability is provided in behalf of a carpenter who works for any corporation or person other than a railroad company? On the other hand, if the work of a carpenter who works for a railroad is not as dangerous as the work of operating a train, then obviously the attempt of the Legislature to classify railroads and impose a liability upon them as to their carpenters, not imposed as to carpenters in other occupations 313 or employments, is arbitrary and unjust, and obnoxious to the Fourteenth Amendment.

Such legislation can only be supported when applied to a particular class—as in this case to railroads alone—upon the theory that the work is peculiarly dangerous when done for a railroad company, but would not be so if done for any other corporation or person. As we have argued, and as the fact unquestionably is, a carpenter engaged in building a coal chute for a railroad company is engaged in a no more hazardous occupation than he would be if he were building a structure requiring the use of similar timbers and appliances for any other corporation or person. The accident whereby Melton was injured was due to the giving way of a chain which held the pulley which was being used in raising a bent, or stick of timber, whereby it fell upon Melton. Obviously there was nothing connected with this accident which was peculiarly incident to railroad operation. If Melton had been building a warehouse or barn for a private corporation or an individual at a point remote from the railroad he would as likely have been injured from the same cause and in the same manner he was injured.

The court says that coal tipples are no less essential to the operation of a railroad than bridges, because the engines can not be operated without coal, and that, therefore, the construction of a coal tipple is essential to the operation of a railroad. This may be conceded, but it does not follow that the construction of a coal tipple is an extra-hazardous employment. In the same way that the construction of coal tipples is essential to the operation of a railroad, 314 so, executive officers, clerks, stenographers station agents, attorneys, freight handlers, and employes in machine shops are essential in the operation of a railroad. Would the court hold that the statute would apply to such persons? So, the employé who cuts trees in the forest out of which cross-ties and timber to be used in the operation of a railroad, does work essential to the operating of a railroad—quite as much as the carpenter who assists in erecting a coal tipple. But would such lumberman be held by the court to be embraced by the Statute? Justice Brewer answers this question in the *Stahley* case, *supra*. According to the reasoning of the court all employes of railroads are embraced by the statute. Certainly the logic of the thing is that if Melton is embraced by it,

there is no class of employes of a railroad who would not be embraced by it. Does the court think that the Supreme Court of the United States would hold the statute is constitutional if, and to the extent, it is to be applied to all employes of railroads, without reference to the hazardous character of their employment? Does the court mean to hold that a State Legislature has the right to enact class legislation, such as this is, having regard solely to the character of the employer, without any reference to the character of the employment? Assuredly the court can not mean so to hold, and yet that is where the reasoning of the opinion, and the decision as applied to the facts of this case, irresistibly lead. The court say, "An act regulating railroads violates no constitutional provision because it is made to apply only to railroads." This is only true in a qualified sense, and can not be constitutionally applied to the facts in this case. The *Ellis*, *Cotting*, and *Connelly* cases, decided by the Supreme Court of the United States, and hereinbefore referred to, and which cases are quoted approvingly in *Bedford Quarries Company v. Bough*, *supra*, point out the limitations to which the doctrine declared by the court in the quotation we have last made from the opinion is subjected.

The court cites as supporting authorities certain cases which we now briefly review. In the *Kane* case (80 N. E. 841) the employé was engaged in repairing a railway bridge supporting railroad tracks over which trains had been moving and the operation thereof was being delayed awaiting the work. The matter was even so urgent that in order to accommodate immediate foot travel, temporary repair was being attempted in advance of permanent reconstruction. Although the constitutional question was not raised, yet as the work was peculiarly railroad work connected with track repair and directly essential to the movement of trains, the case would come within the reason for railroad classification, as illustrated even by the *Minnesota* cases. In the case of *Schoolcraft's Admr.* (92 Ky. 233), our court upheld the statute enacted for the protection of the public against the dangers of railroad operation. The decedent was not an employé of the railroad company, was one who came within the reason of the statute, and was killed by the negligent operation of a train. There is nothing in that decision which opposes our contention in the case at bar.

In the *Stanley* case, as has been already pointed out, the work was distinctly railroad work directly connected with train operation and attended by peculiar railroad peril. The reasoning of Judge Brewer strengthens the position of appellant in this litigation.

In the *Callahan* case (170 Mo. 473, 194 U. S. 628) the work was peculiarly and distinctly railroad work, directly connected with the movement of trains and attended by the haste, urgency, and
 316 peril peculiarly incident to such railroad operations, as emphasized in all the opinions. As that case is urged by learned counsel for appellee as their main support, we desire to call the especial attention of the court to an opinion of the same court rendered after the decision of the *Callahan* case and which is expressly concurred in by the justice who wrote the *Callahan* opinion. This

subsequent comment of the court clearly shows the application of the statute under consideration in the Callahan case. We ask the court to read the late case of *Sams v. St. L. & M. R. Co.*, 73 S. W., p. 686. We must confine quotation therefrom to this pertinent paragraph, viz.:

"If the corporation, on its own account, was erecting a depot building and a carpenter engaged in the work was injured through the negligence of another carpenter in the same work, both being employ  s of the company, the company, on that theory (appellant's), would be liable. In such case it would not avail the company, when sued, to say: 'We were not at that time engaged in an operation peculiar to a general railroad corporation. We were building a house, conducting the work in manner like any other house-builder would do, and our employ  s were not subject to any greater or different risk than other carpenters in like work.' For to all that, on appellant's theory, the conclusive answer would be: 'Your charter determines your character and fixes your relation to the fellow-servant statute.' But that can not be the law. Our fellow-servant act itself draws a distinction which appellant's argument overlooks. It does not impose the liability on railroad corporations

317 because they are railroad corporations, nor does it apply to them without reference to the business in which they are in fact engaged, nor to their employ  s in every capacity. The language of the statute is: 'Every railroad corporation owning or operating a railroad in this State shall be liable for all damages sustained by any agent or servant thereof engaged in the work of operating such railroad by reason, etc.' Thus we see that by the very words of the statute the liability is not imposed on railroad corporations *quia* railroad corporations, but on concerns that own and operate railroads in this State; and the liability is not for damages sustained by any servant of the company, but only by a servant engaged in the work of operating such road. From this it is clear that the lawmakers had in mind the kind of work in which the men whom they aimed to protect were engaged. The peculiar character of the work of operating a railroad was, to the minds of the lawmakers, the reason for making a peculiar class of the men engaged in that work, and affording them relief not afforded to other hired servants, and imposing on their employers a liability not imposed on other masters. It is the peculiar character of the work that justifies the statute in the eyes of the Constitution, and it is upon that ground alone that its validity has been upheld. It is the condition, and not the theory, that justifies the law. This law applies to a master who, as a matter of fact, owns or operates a railroad, and to a servant, who as a matter of fact, is engaged in its work of operating that railroad. It applies to no other master, to no other servant." (Our italics.)

The whole of this opinion should be read. The Callahan case, interpreted in the above light by the very court which gave
318 it utterance, becomes a very important authority for appellant. While the statute was not applied in the *Sams* case, the Indiana court has held, in the *Kane* case, that the statute of that

State does apply to street railroads; therefore, the reasoning of the Missouri court is very apposite here. If the statute can not apply to a carpenter engaged in such railroad work as building a depot, what must be said of its application to one who was building a coal chute for a coal company convenient to the railroad tracks where the coal company could load the coal upon the completion of its tippie into the tenders for the coaling of engines, and into cars for transportation? If the building of a railroad depot did not involve that inherent railroad peril which forms the constitutional basis of such legislation, what shall be said of the work being done by appellee?

The remaining case cited in the opinion of this court is *R. Co. v. Ivey*, 73 Ga. 504. The decedent was engaged in erecting a railroad bridge over a river for trains to enter a new depot. While the work was distinctly railroad work and directly essential to the movement of trains, yet the only constitutional point considered was that the statute violated the State Constitution forbidding special legislation when the object could be accomplished by general laws. There was no Federal question involved. The opinion gives no color whatever to this controversy, and we regret to see this court cite it as supporting authority in view of its utter lack of judicial tone and treatment. We place by the side of the *Ivey* case, the opinions of another Southern State in the cases of *Ballard v. R. Co.*

81 Miss. 507, and *Bradford Construction Co. v. Heflin*, 42 319 So. 174, where the constitutional question is discussed with learning and ability by the Supreme Court of Mississippi.

The case last cited is a very recent one, and we quote from its conclusion as follows:

(The point for decision)—“is that said Section 193 of the Constitution applies to the employés of railroad corporations proper, engaged as common carriers in the transportation of freight and passengers, and to such employés only when injured whilst doing work in some manner connected with the use and operation of the railroad. This latter proposition has been expressly decided in *Luce v. Chicago, etc. R. Co.*, 67 Pa. 75, 24 N. W. 600, the court holding that ‘one employed in a railroad coal-house, and injured by the negligence of a co-employé whilst loading coal upon a car, can not recover from the company, because the injury in such connection is not in any manner known as the use and operation of a railroad’; and also in *Blomquist v. R. Co.*, 65 Minn. 69, 67 N. W. 804, in which the court said: ‘In order to sustain the law, we have by judicial construction limited its operation to those employés of railroads who are exposed to the peculiar dangers attending the operation of railroads, or what are, for brevity, called railroad dangers.’ It manifestly never was the purpose of the constitution-makers in said Section 193 to give to all employés of railroad corporations the remedies therein provided. They meant such employés as were imperiled by the hazardous nature of the business of operating railroad trains. The very ground upon which the United States Supreme Court all along held that such legislation was constitutional was that the nature of the business of operating railroad cars is inherently dangerous. It would be absurd to hold that there was any

320 inherent danger in discharging the duties of ticket agent, or telegraph dispatcher, or many other offices in which employes of railroads are at work. It would be equally absurd to hold that employes of a railroad corporation engaged in the construction of a roundhouse or in any other work not at all connected with the operation of the cars were engaged in work inherently dangerous. They would be in no more danger than any other like employe of any other master. In short, the reason which sustains said Section 193 of the Constitution being the inherent danger attending the actual operation of railroad trains, the remedy must be limited to those employes whom such danger imperils."

This court seems to take the position that the Legislature may classify railroad corporations as such upon some general basis and then impose some special liability not resting upon any distinctive reason, but such it not warranted, as we read the authorities. Besides, we must not overlook the vital proposition that the statute in question does not attempt to classify railroads as such, but it is a statute to regulate liability of masters for a certain class of dangers to a certain class of employes exposed to such dangers. The Lightheiser case, *supra*, cited in the opinion of this court, is our strongest authority on this point. That case distinctly holds that the statute was not aimed at railroads as such, but was for the purpose of protecting employes who were exposed to the peculiar dangers of railroad operation. Now, if appellee, when injured, had been in the employ of the Ingle Coal Co., surely no one would contend that there would be liability upon that master under the Bough and Lightheiser cases, because his work was not essentially railroad work or

321 directly connected with railroad operation, so that he was exposed to that class of dangers demoninated "railroad dangers". But the Supreme Court of the United States and the Supreme Court of Indiana expressly hold the character of the master is unimportant, that the statute applies to all masters alike, but that the test is, "Was the employe at the time engaged in railroad work and injured by reason of the peculiar dangers which come within the purpose and spirit of the law and form its constitutional basis?"

We very briefly call attention to a very prejudicial application of the Indiana statute, even if it could be constitutionally applied to the facts of this case. The petition made the general charge that plaintiff was injured while conforming to orders of his foreman, which was held good as against demurrer and motion to make more specific. The instructions were in like general language as to the orders of the foreman. Under the opinion, the method of raising the bent "by jerks and surges" which made the load beyond the tensile strength of the chain, even if not defective, must have had considerable weight with the jury. While we must admit that under the Indiana decisions the method of doing the work may be considered "an order," yet the authority is all one way that such is ordinarily not a special order within the meaning of the statute, and if the manner of doing this work was according to routine there was no liability therefor. Hence the vital error of permitting such general charge, which embraced the negligent method of raising the bent

without capstan, by jerks and surges, and of attending to the detail of the work, as well as such specific orders as the foreman
 322 gave, all of which impressed the jury adversely to appellant.

In our brief we discussed sundry other grounds of error, which we believe was committed by the trial court, and which grounds, to the extent the court has passed upon them in the opinion, it decided adversely to our contentions. We still think that our specifications of error were well taken, and that the opinion is erroneous in holding otherwise. But we will not, in this petition for rehearing, attempt to reargue those assignments of error. We are so firmly persuaded that upon a reconsideration of the question the court will feel compelled to sustain our contention as to the unconstitutionality of the Indiana statute, as applied to the facts of this case, that we will present but this one question, and the one referred to in the last preceding paragraph, for the reconsideration of the court in this petition for rehearing.

We ask that a rehearing be granted, and that upon such rehearing the opinion delivered herein be withdrawn, and that the court reverse the judgment appealed from.

Respectfully submitted.

BENJAMIN D. WARFIELD,
 WADDILL & DEMPSEY,
Counsel for Appellant.

323 And afterwards at a Court of Appeals held at the Capitol at Frankfort on the 6th day of January, 1908, the following order was entered:

L. & N. R. R. Co.

v.

MELTON.

Hopkins.

Came the appellant by counsel and filed notice and grounds and moved the Court to grant an oral argument on the petition for rehearing, to which motion appellee by counsel objected, and filed a reply to the petition for rehearing.

The grounds for an oral argument referred to in the foregoing order, together with the notice, are as follows:

324 Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,

vs.

SPENCER MELTON, Appellee.

Appellant's Motion for an Oral Argument on Petition for Rehearing.

In accordance with notice served on counsel for appellee, and which notice is hereto attached, appellant, by its counsel, moves the

court to grant it an oral argument on its petition for rehearing filed by it in this court December 20, 1907, upon the judgment of the Court delivered in this cause November 19, 1907.

A more satisfactory discussion of the questions involved will be afforded by an oral argument which can be heard by all of the judges, and in such argument a more intelligent review and satisfactory analysis of the authorities can be made. The Federal question involved is a very important one, and, inasmuch as the Supreme Court of the United States will be called upon to pass upon the question if this Court shall adhere to its opinion heretofore delivered, we deem it only right that this Court shall give the question the fullest consideration, and have the benefit of all the light that counsel for appellant can shed upon the question, before the Court determines whether or not it will adhere to or depart from its opinion heretofore delivered herein.

The principle is well settled that the Supreme Court of the United States, and the Courts of last resort of States other than that whose legislative authorities enacted the statute, will accept the construction placed upon the statute by the court of last resort of the State enacting it; therefore, this court is bound by the construction of the Indiana statute placed upon it by the Supreme Court of that State.

The Court declare their inability to see certain distinctions as to the constitutional application of the Indiana statute which we think the authorities make clear. We contend, that if the court will grant the oral argument we think we can demonstrate that under the construction placed upon the Indiana statute by the Supreme Court of that State in *P. C. C. & St. L. R. Co. v. Lighthouse*, 78 N. E. 1033, and *Bedford Quarries Co. v. Bough*, 80 N. E. 529, the statute cannot be constitutionally applied to the facts in this case.

326 In the *Lighthouse* case it was held that the classification of railroads by themselves, in the statute, was proper on account of the dangerous and hazardous character—the peculiar hazards—of the business of operating railroads; that this classification is based, not on the difference in employers but upon a difference in the nature of the employment; that the character of the employer is not a controlling factor—it is not important—but that the nature of the employment is the test to be applied; that the spirit and purpose of the statute was the protection of employes engaged in the dangerous and hazardous work of operating railroads.

This doctrine was redeclared and emphasized in the *Bough* case, decided March 1, 1907. The Supreme Court of Indiana there held that the statute in question while applying by its terms to all corporations, except municipal, violated the Fourteenth Amendment to the Federal Constitution, and was therefore unconstitutional, as to all employers except those operating railroads, and could only be upheld as to the latter class of employers as to their employes who were engaged in the extra-hazardous business of operating railroads; that the character of the employment was the test to be applied in determining the validity of the statute, and not the character of the employer.

327 Melton, might just as well have been employed by the

Ingle Coal Company to do the work he was doing when injured, as to have been employed by the railroad company to do that work. If he had been so employed by the coal company, admittedly, the statute would not apply. Obviously, therefore, it cannot be applied in his favor against the railroad company without violating the Fourteenth Amendment to the Federal Constitution. To apply the statute in favor of Melton is to make a classification because of the character of the employer and not because of the character of the employment. Under the Lightheiser and Bough cases, and under the overwhelming weight of authority, this is not permissible.

There are few cases before the Court of as much importance and we question whether there is any case before the Court of more importance, than this one. Not only is an important question of Constitutional law, under the Constitution of the United States, involved, but there are other novel and interesting questions which were presented in our original argument. The judgment was for \$22,000. which is by \$7000. the largest judgment ever affirmed by this court in an action for damages for personal injuries or death. Appellee cannot be prejudiced by the delay, if any, of granting an oral argument. If he should finally succeed appellant will have to pay him not only the face of the judgment but interest thereon as well as the 10% damages awarded by this Court on the affirmance of the judgment. If, however, on the other hand, appellant should finally win, as we are convinced it ought to do, the granting of the oral argument will have accomplished, possibly, an act of justice, which this Court has denied to appellant down to this time.

Appellant earnestly asks that the oral argument prayed for be granted.

Respectfully submitted,

BENJAMIN D. WARFIELD,
WADDILL & DEMPSEY,
Counsel for Appellant.

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Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
SPENCER MELTON, Appellee.

Notice.

To Spencer Melton, Appellee:

Take notice that Appellant, Louisville & Nashville Railroad Company, has filed Petition for Rehearing in the above-styled court and case, and that it will on Monday January 6, 1908, move the said court for oral argument on said Petition.

B. D. WARFIELD AND
WADDILL & DEMPSEY,
Attorneys for Appellant.

We accept service of within notice, December 21, 1907.

GORDON & GORDON & COX,
Attorneys for Appellee.

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Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
SPENCER MELTON, Appellee.

Notice.

To Spencer Melton, Appellee:

Take notice that Appellant, Louisville & Nashville Railroad Company, has filed Petition for Rehearing in the above-styled court and case, and that it will on Monday January 6, 1908, move the said court for an oral argument on said petition.

BENJAMIN D. WARFIELD,
WADDILL & DEMPSEY,
Attorneys for Appellant.

We accept service of within notice, December 21, 1907.

CLAY & CLAY,
Attorneys for Appellee.

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The reply to the petition for rehearing referred to in the foregoing order is in words and figures as follows, to-wit:

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Kentucky Court of Appeals.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
SPENCER MELTON, Appellee.

Response to Petition for Re-hearing.

The appellant's petition for re-hearing presents for the reconsideration of the Court, the sole question of the constitutionality of the Indiana Employer's Liability Statute. Upon this question it presents no new argument, and gives no reason for upholding this act unconstitutional that was not presented and given in the elaborate brief filed before the decision of the case. It cites but three additional authorities, not cited in the original brief, and those three decisions are not based upon the question here involved at all, but upon questions wholly foreign to this case. The question now presented was fully and at great length discussed by both sides in the original briefs, was fully considered by this court, and is directly passed upon and decided, adversely to appellant's contention, in the opinion delivered. It therefore seems to us that but little need be said in response to the petition for re-hearing.

This Court in passing on this question, in the opinion delivered says:—

"A railroad cannot be run without bridges; bridges cannot be built without carpenters. The work of a bridge carpenter on a railroad is perhaps less perilous than the work of an operative on one of its trains. Coal tipples are no less essential to the operating of a railroad than bridges because the engines cannot be operated without coal. The construction of a coal tipple is therefore essential to the operating of a railroad."

Counsel attack this manifestly sound and logical proposition of this Court, on two grounds,

333 First. They say the Court treats this as a case where a carpenter was injured in building a bridge. They set up their man of straw and knock him down again, by saying "This is not correct." Of course it is not correct, and no one else could read the opinion of the Court and get the faintest impression from it, that Melton was engaged in building a bridge. The Court properly states the fact to be that he was engaged in the construction of a coal chute, or coal tipple, for the railroad company to enable it to coal its engines. At another place they say that it is not clear that the work was being done for the railroad company, and that there is as much evidence that it was being done for the Ingle Coal Co., as there is that it was being done for the railroad company. With all due respect to counsel, this statement is absolutely incorrect. Since reading the petition for re-hearing we have read over very carefully the transcript of the evidence taken at the trial in shorthand, and there is not a single, solitary statement, by a single, solitary witness, that this work was being done for the Ingle Coal Company, or for any one else other than the Louisville & Nashville Railroad Co. In one place, counsel in framing his question assumes that it is being done for the coal company, but at no place does any witness say so. On the other hand all the witnesses say it was being done for the railroad company; they were all employed by the railroad company; Melton says the object of the work was "to let passenger and freight trains coal their engines," (transcript of evidence page 3); and no witness states otherwise. The witnesses state, and the diagram shows the work was along the side of the main track of the defendant's railroad, upon its right of way, and as a matter of

fact one can reach one's arm out of a car window in passing
334 this point, and touch the coal chute that was then in course of construction. Instead of the evidence on this question being meager and unsatisfactory, it is overpowering and conclusive, and the statement of counsel is neither borne out by facts as they really exist, nor by the facts as testified to by the witnesses.

Second. It is contended next, that even admitting the findings of this Court to be correct, that "the construction of a coal tipple is essential to the operating of a railroad," and that the work of constructing such a tipple for a railroad is perhaps no less perilous than the work of an operative on one of its trains, still the Statute in question is unconstitutional, as applied to this case, because it was no more dangerous for Melton to do this work for the railroad company

than it would have been if he had been doing the same work for any one else.

In the discussion of the question counsel criticises this Court for citing as an authority the case of *R. Co. vs. Ivey* 73 Ga. 504, and state that it has no application to this case. The question in that case was the question raised in this case, as to whether the Georgia Employer's Liability Act applied to carpenters who were not injured in the actual operation of trains. It is true the question of conflict with the Federal Constitution was not raised in that case; but the constitutionality of the act there in question was attacked upon a point practically the same as that involved under the 14th amendment. The main question in the case was, however, as to whether the act applied so as to permit a person to recover who was not injured in the operation of trains. The Court held that
335 it did. In a later case, *Georgia & C. R. Co. vs. Miller*, 90 Ga.

571, the employé was injured while assisting in taking an eccentric off of an engine. The question was again raised that the Georgia Statute only applied to persons injured in the running of trains, and it was also insisted that the statute, if otherwise construed, was in violation of the 14th amendment. The Court held that under the repeated adjudications of that Court the statute applied, cited and approved the *Ivey* case, and held further that the act as thus construed was not in conflict with the United States Constitution.

In the course of the argument as contained in the petition for rehearing, appellant cites three cases, not cited in the original brief. We will notice them briefly.

In *Sams vs. St. L. & M. Co.* 73 S. W. 686, the question at issue in this case was in no sense involved. The question there was as to whether the Missouri Statute applied to street railways, and as to whether the employer there was a street railway or a railroad company. The Court held that the *St. L. & M. Co.* was a street railway company, and that it was not the intention of the legislature to embrace such companies within the statute. In passing on the case the Court called further attention to the fact that the Missouri Statute did not impose liability on "railroad corporations," but on concerns that own and operate railroads, and that under the particular wording of the statute the liability was not for damages sustained by *any* servant of the company, but only by a servant engaged in the work of operating such road. The Missouri Statute is more
336 more restricted than the statute of nearly all the other states where employer's liability statutes have been passed. But, even under the Missouri Statute, with the Callahan decision before us, the Supreme Court of Missouri could not have held otherwise than that "Coal tipples are no less essential to the operating of a railroad than bridges, because the engines cannot be operated without coal. The construction of a coal tipple is therefore essential to the operating of a railroad."

Counsel also cites the case of *Ballard vs. R. Co.* 81 Miss. 507 (62 L. R. A. 407). That case, like the Indiana case of *Bedford Quarries vs. Bough*, involved the constitutionality of a Mississippi

Statute which applied to corporations generally, and did not apply to individuals. It was a case which was thoroughly presented and well considered. It is a very respectable authority upon the question then before the Court, but the question there considered is not before this Court in any sense. Here is the conclusion of the court in the Ballard case, as found at page 582,

"Our conclusion, after the most careful and protracted consideration, is that section 1, of the act of 1898, violates the fourteenth amendment of the Constitution of the United States, in that it imposes restrictions upon *all corporations*, without reference to any difference arising out of the nature of their business, which are *not* imposed upon *natural persons*, and this denies to corporations the equal protection of the laws."

It is not what the Mississippi Courts have held in regard to statutes classifying corporations, which will throw any light upon this case, but what it has held, or would hold in regard to a statute classifying railroads. This very case we are discussing throws some light upon that question. At page 580 the court said:—

337 "But, fourth, it is objected that in the Mackey case, the Supreme Court of the United States distinctly held that it was exclusively within legislative discretion whether these liabilities should be applied to common carriers by canal and stage coach and to persons and corporations using steam in manufacturies, and it is said there is nothing inherently dangerous in the business of a canal carrier or of a stage coach. Whether this is true as applied to canals is not so clear. It does seem difficult to find any inherent danger in the business of stage coaching; but as we have heretofore remarked we do not understand the dangerousness of a business to be the only distinctive difference on which such statutes may be upheld. On the contrary, we understand the United States Supreme Court to hold that such statutes may be upheld, if they are based in their classifications upon any substantial and essential difference between the natures of the business of the favored corporations or individual employers, and the natures of the businesses of all other corporations or individual employers."

Bradford Construction Co. *vs.* Heflein, 42 So. 174, cited by Appellant, was decided by the same court, and involved the same question as the Ballard case, namely, the constitutionality of a statute classifying corporations generally.

All the other cases cited in the petition for re-hearing were cited in the original brief of Appellant and were commented upon, discussed and distinguished in the original brief of Appellee. We do not deem it necessary to notice them here, further than to say that none of them, in so far as the questions actually at issue are concerned, are in conflict with the opinion of this Court in
338 this case, and none of them go to the length of sustaining the position of counsel for Appellant.

Take out of the petition for re-hearing its surplus and redundant matter; strip it of all "vain repetition"; boil it down; reduce it to its last analysis, and their argument simply means, that the statute in question is unconstitutional in its application to every case in

which it can be shown that the work at which the injured employé was engaged was the same kind of work which that employé might have been doing for some non-railway employer. The whole of the argument of counsel is an answer to this question, propounded at page 4, of the petition for re-hearing:—

"If this is so, then how can the statute be constitutionally applied in behalf of appellee, merely because he was working as a carpenter for a railroad company at the time he was injured, when he would have had no right to recover under the law of the state where he was injured, if he had not been working for a railroad company, but had received the same injuries in the same manner while doing the same kind of work for a corporation or individual other than a railroad."

This Court has answered this question, and so have we, but we answer it again, not simply giving our own opinion, but by giving the decisions of the courts. In *Railroad Co. vs. Koehler*, 37 Kas. 463, cited and approved by the United States Supreme Court in *R. Co. vs. Pontins* 157 U. S. 209, the employé was injured in loading rails from the ground to a car, not by reason of the operation of a train of cars, but by reason of the negligence of a fellow servant who was assisting in the work. A recovery was permitted. This

339 Court will take judicial knowledge of the fact that rails are manufactured, and they have to be shipped from the place of manufacture and have to be loaded into cars for this purpose.

Suppose, instead of being employed by the railroad company Koehler had been employed by the manufacturer of these rails to load them from the factory into a car for shipment, and had been injured through the negligence of a fellow servant. He could not have recovered. Yet here would have been the same character of work, attended with no more danger than doing the same work for the railroad. The Supreme Court of Kansas and the Supreme Court of the United States answer the question propounded by counsel for appellant, and say this makes no difference, the statute is constitutional.

The question is also answered in all the other cases cited in the original argument. As a further answer to the question however, we submit the following quotation from *Magown vs. Bank*, 170 U. S. 290 (42 L. Ed. 1042):

"The rule, therefore, is not a substitute for municipal law; it only prescribes that the law have the attribute of equality of operation, and equality of operation does not mean indiscriminate operation on persons merely as such, but on persons according to their relation. In some circumstances it may not tax A. more than B., but if A. be of a different trade or profession than B., it may. And in matters not of taxation, if A. be a different kind of corporation than B., it may subject A. to a different rule of responsibility to servants than B., (*Missouri P. Ry. Co. vs. Mackey* 127 U. S. 205), to a different measure of damages than B. (*Minneapolis & St. L. Ry. Co. vs. Beckwith* 129 U. S. 26), and it permits special legislation in all of its varieties." (Citing a number of cases).

340 "In other words, the state may distinguish, select, and classify objects of legislation, and necessarily this power must have a wide range of discretion."

The court then goes on to show that the classification must be

reasonable, and not a mere arbitrary selection, and proceeding says:

"There is therefore no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities. And necessarily so. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things."

If there is any reasonable ground upon which to base a classification, and all persons within the class are treated alike under the same or similar circumstances then the classification is legal. There is no trouble or dispute about the general rule to be applied. The trouble with counsel for appellant is, they treat all carpenters and employers of carpenters as a class, and complain because all employers of carpenters are not made liable. The legislature of Indiana did not attempt any such classification; whether it might have done so or not is not material to consider. If they had attempted to do so, then certainly before the act could be upheld, it would have to include all within the class. Under this statute however, the classification is confined to railroads operating in the State of Indiana, and to employees while in its service. If an employé of one railroad company is injured and could recover under the statute, and an employé of another railroad company is injured under the same or similar circumstances and could not recover under the statute, then there would exist an inequality which the law would not tolerate. But

341 such is not the case here. All railroad companies, corporate or individual, are brought under the scope of the act, and it is no objection that some corporation or individual, not engaged in the railroad business is excluded, for, as stated above, "there cannot be an exact exclusion or inclusion of persons and things."

In concluding our response upon this question, we submit the following extracts from the printed brief of Appellee.

"The whole of the argument of appellant is predicated upon the idea that the work appellee was engaged in was no more hazardous when done for the railroad, than it would have been if he had been working for a coal mine, or in building a bridge for the county, or a barn for a farmer, and therefore, it is argued, the Indiana Statute does not apply, or if it does apply, that it is unconstitutional. We have shown by abundant authority, including the Indiana Supreme Court, that this, the very foundation of appellant's argument, is builded upon the sand, and the whole structure has been destroyed by repeated decisions of the courts of this country. If that argument were sound, then classification would amount to nothing. Very few, if any, personal injuries were ever inflicted upon an employé of a railroad company but what the same circumstances, properly brought into combination, might have produced the same result in some other employment. A railroad engine explodes through the negligence of an employé in charge thereof and injures a fellow servant. According to this argument the railroad would not be responsible because the same injury might have been inflicted anywhere that steam boilers are used. One injured while putting a driving rod on an engine for a railroad company could not recover, because driving rods must be put on engines not used in the rail-

road business; yet the Stahley case was upheld. One
342 injured while repairing a bridge for a railroad company could not recover, because the work is no more hazardous than repairing a bridge for the county; yet we have seen that in the Kane case in just such work a recovery was permitted. Also the Pontius case. One injured while removing timbers taken out of a railroad trestle could not recover, because the work was no more hazardous than the removal of such timbers from any other structure; yet in the Callahan case a recovery was permitted. So, down the whole line, cases might be paralleled, and the inevitable result of following appellant's argument would be to abolish classification altogether."

"Classification is permitted when all persons, individual or corporate, included in the class, are brought under its influence and are treated alike under the same conditions. All railroads, whether owned and operated by individuals or by corporations, are included in the act in question, and the employers, as well as the employes of all, are brought under its influence and are treated alike under the same conditions. The classification is not confined and should not be confined to the mere operation of trains, but is extended, and may be extended, to the hazardous work of operating a railroad. The hazards of railroad operation generally are not confined merely to those who operate trains. The employes of railroads are not kept in one place where they may know all the dangers, and hazards of the place from previous knowledge, but they are moved about from place to place, as in the case at bar. A bridge carpenter for a railroad company may be working in St. Louis today, and tomorrow may be sent to Nashville; the next day he may be found at Evansville, or some other point on the road, and so on. The place that

343 knew him once knows him no more, and he is confronted with new and strange localities, and new and strange conditions. This makes the business of a bridge carpenter for a railroad more hazardous, and justifies their inclusion in the class. Not only this, but there are, in many instances, thousands of other employes whose qualifications and fitness he cannot know and is not expected to know. The common law fellow servant rule requires him to know and makes him assume the burden of their qualifications; the statute in question comes to his rescue, relieves him from the burden of acquiring such knowledge and places the burden where it naturally belongs, upon the employer. This affords another of the reasons for classifying railroads and railroad employes."

The common law rule finds its justification in the conditions which existed when it was adopted. Industrial enterprises were carried on with comparatively simple machinery, and comparatively few employes, who were justly presumed to know each other and their qualifications to perform the work in hand. Under such conditions the employe was required to assume the risks caused by negligence of his fellow employes. The onward march of modern progress has changed the old conditions and abolished the reason for the old rule. The reason for the rule having ceased, in many states the rule itself has been abolished, and legislatures all over the country are awaking to the fact, that the protection of the laborer demands that the employer, and not the employe, should have and assume the burden for the negligence of one in his employ. The statute in question is one

of the many that have been adopted to meet the new conditions, and, as applied to railroads its effect and its beneficial influence has been and will continue to be felt in the increased care that it has brought about for the protection, not only of the employé, but of the public generally. Such a statute, when applied to railroads, is not only constitutional, but is right in principle. The position of appellant on this question is, as said by Justice Holmes, in *Minnesota Iron Co. vs. Kline*, *supra*, "merely one of the many attempts to impart an overmathematical nicety to the prohibition of the 14th Amendment."

This case involving as it does, a constitutional question was considered and decided by the whole court, and not by one division thereof, and there was no dissenting opinion. Every phase of the case was discussed at great length in the printed briefs and decided by the whole court. The question now presented was included in the discussion, and directly passed upon and decided. Under these circumstances we confess we do not see what Appellant expects to gain by a re-argument of the case. We understand the rule to be that a writ of error, upon which the case may be taken to the Supreme Court of the United States, is not granted as a matter of right, but only upon a showing that the case is not being taken to that court for delay merely and is not frivolous. It seems to us the only object of this additional argument is to delay the final determination of the case, and to muddy the waters, create confusion, and thus obtain a writ of error, when it would otherwise not be granted; to make it appear that the question discussed is involved in doubt and uncertainty, when it is clear and well settled. We trust this Court will not sanction this effort, but will stand by and uphold the able, concise and clear opinion heretofore handed down, without modification or extension. We are convinced that its opinion will be affirmed with the usual damages in delay cases, if the case is taken to the Supreme Court.

We would have entered no objection whatever to the granting of an oral argument if it had been applied for upon the original hearing, and would enter none now except for the delay and unnecessary time and expense which it would entail. The appellant has unlimited means at hand to delay and prolong this litigation, while the appellee is in absolute want, can ill afford to spend a dollar more than is necessary to secure his legal rights, and requires the amount due him with as little delay as possible. We therefore oppose the granting of an oral argument at this late day. While there is no express rule of this Court known to us, authorizing an oral argument upon a petition for re-hearing, it would doubtless have the inherent right to order such an argument if, in its opinion the ends of justice required it, but in this case an oral argument is wholly unnecessary, and would only result in further delay.

We ask that the petition for re-hearing be overruled.

Respectfully submitted,

GORDON & GORDON & COX,
CLAY & CLAY,

Attorneys for Appellee.

346 And afterwards on the 8th day of January at a Court of Appeals held at the Capitol at Frankfort, the following order was entered, to-wit:

L. & N. R. R. Co.

v.

MELTON.

Hopkins.

The Court being sufficiently advised, appellant's motion for an oral argument on the petition for rehearing is sustained, and said case is set for oral argument on January 30th, 1908.

And afterwards at a Court of Appeals held at the Capitol at Frankfort on the 30th day of January, 1907, the following order was entered to-wit: .

L. & N. R. R. Co.

v.

MELTON.

Hopkins.

This case coming on to be heard on the petition for rehearing was argued by Benjamin D. Warfield for the appellant and James Clay for appellee and submitted.

And afterwards at a Court of Appeals held at the Capitol at Frankfort on the 13th day of May, 1908, the following order was entered, to-wit:

L. & N. R. R. Co.

v.

MELTON. .

Hopkins.

The court being sufficiently advised it is considered that the motion and petition of appellant for a rehearing, be and the same is overruled. (Response filed.) Whole Court sitting, Judges

347 Barker and Lassing dissenting. And came the appellant by counsel, and on motion the issual of the mandate herein is ordered suspended for 30 days.

The response referred to in foregoing order is as follows:

Court of Appeals of Kentucky.

May 13, 1908.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
 SPENCER MELTON, Appellee.

Appeal from Hopkins Circuit Court.

Response to Petition for Rehearing by Judge Hobson.

We are unable to see that the Indiana Statute as construed in the opinion is in violation of the fourteenth amendment to the Constitution of the United States or that any right guaranteed
 348 thereby is denied by the decision in this case. We endeavored to show this in the original opinion. We are also unable to see that the conclusion we reached is not in keeping with the construction of the Statute by the Supreme Court of Indiana. Our conclusion is sustained by the following cases in other states under similar Statutes. Georgia &c. R. R. Co. *v.* Miller, 90 Ga.; 571; Railroad Co. *vs.* Kochler, 37 Kans. 463; Georgia &c. R. R. *v.* Hicks, 22 S. E. 613; Campbell *v.* Cook, 86 Texas, 630; Galveston &c. R. R. *v.* Mohrman, 93 S. W. 1090; Sherman *v.* Texas &c. R. R., 91 S. W. 561; Hancock *vs.* Norfolk &c. R. R. 32 S. E. 679; Rutherford *v.* Southern R. Co. 35 S. E. 136; Mott *v.* Southern R. R. Co., 42 S. E. 601; Sizemore *v.* Southern R. R. Co., 47 S. E. 420; Nicholson *v.* Transylvania R. R. Co., 51 S. E. 40; Texas R. R. *v.* Carlin, 111 Fed. 777; 189 U. S., 354; Edge *v.* R. R. Co., 104 S. W., 90.

The petition is overruled.

Judges Barker & Lassing dissenting.

Benjamin D. Warfield, Waddill & Dempsey, for Appellant.
 Clay & Clay, Gordon & Gordon & Cox, for Appellee.

349 Be it remembered that on the 21st day of May, 1908, there was filed in the office of the Clerk of the Court of Appeals an Assignment of Errors, and which is attached hereto, and is as follows:

350 Supreme Court of the United States.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plaintiff in Error,
v.
 SPENCER MELTON, Defendant in Error.

Assignment of Error and Prayer for Reversal.

Plaintiff in error, the Louisville & Nashville Railroad Company, assigns the following error in the judgment of the Court of Appeals of Kentucky herein, namely:—

The court erred in holding that the Employers' Liability statute of Indiana can be constitutionally applied to the facts of this case.

When so applied the statute violates section 1 of Amendment 14 of the Constitution of the United States. In order to uphold the Indiana statute, which has been construed by the Supreme Court of that State to be applicable to railroads alone, the statute must be construed as applying only to cases of injuries to railroad employes engaged in the extra-hazardous branches of railroad service; to those railroad employments which are more hazardous than employments in any other businesses: The applicability of the statute must be made to depend on the character of the employment and not on the character of the employer. The defendant in error was employed as a carpenter, and, at the time he received the injuries sued for, was engaged in doing ordinary carpenter's work in connection with the erection of a coal tipple or chute at the Ingle Coal mines, close to, but not on or forming a part of, the railroad of the plaintiff in error, in Indiana. The work defendant in error was doing was no more dangerous to him, merely because he was employed by a railroad company, than if he had been doing the same character of work for an employer other than a railroad company. In the latter event, admittedly the statute would not apply, and there would be no liability under the common law of Indiana. We, therefore, contend that the action of the Court of Appeals of Kentucky in holding the Indiana statute applicable to this case—in holding that defendant in error is entitled to recover under the statute—violates section 1, of the Fourteenth Amendment to the Constitution of the United States, in that it deprives the plaintiff in error of its property without due process of law, and denies to said plaintiff in error the equal protection of the laws. As thus applied, the statute is class legislation in that the attempted classification of railroads by themselves does not rest upon some difference which bears a reasonable and just relation to the act in respect of which the classification is proposed, but is an arbitrary selection. Moreover,

351 the Supreme Court of Indiana, had the case been before that court instead of before the Court of Appeals of Kentucky, would not have applied the Indiana statute to this case, in view of its opinions construing the statute.

Both this Honourable Court and the Court of Appeals of Kentucky are bound to accept the construction of the Employers' Liability Act of Indiana which the Supreme Court of that State has placed upon said statute.

Wherefore, the plaintiff in error prays that the judgment of the Court of Appeals of Kentucky may be reversed by this Honourable Court, and this cause remanded to said Court of Appeals of Kentucky with directions to send down its mandate to the Hopkins Circuit Court, directing it to dismiss the petition against the plaintiff in error.

BENJAMIN D. WARFIELD,
CLIFTON J. WADDILL,

Counsel for the Plaintiff in Error.

Filed May 21, 1908.

ED. C. O'REAR,

Chief Justice Court of Appeals of Kentucky.

Filed May 21, 1908.

NAPIER ADAMS, C. C. A.

352 And on said date there was filed in the office of the Clerk of the Court of Appeals, a petition for a Writ of Error, and which is attached hereto and is as follows:

353 Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
v.
SPENCER MELTON, Appellee.

Petition for a Writ of Error.

To the Honorable Ed. C. O'Rear, Chief Justice of the Court of Appeals of Kentucky:

The Louisville & Nashville Railroad Company, appellant in the above entitled case in the Court of Appeals of Kentucky, hereby petitions for the allowance of a writ of error from the Supreme Court of the United States to the Court of Appeals of Kentucky, in order that the judgment of the Court of Appeals in that case may be reexamined by the Supreme Court of the United States, and reversed if found to be erroneous: The ground of this application is that the Louisville & Nashville Railroad Company claimed, and still claims, in that case that the statute of Indiana under which appellee, Spencer Melton sues, and upon which he solely relies for a right of recovery in this action, cannot be constitutionally applied to the facts in this case without violating section 1 of the Fourteenth Amendment to the Constitution of the United States; and the said Louisville & Nashville Railroad Company further petitions that upon the allowance of said writ of error, and the execution of a supersedeas bond to be approved by your Honor, that the mandate of this court be suspended, and that no execution be issued for the satisfaction of said judgment, pending the argument and decision of this case in the Supreme Court of the United States.

BENJAMIN D. WARFIELD,
WADDILL & DEMPSEY,
Counsel for Louisville & Nashville Railroad Company.

Filed May 21, 1908.

NAPIER ADAMS, C. C. A.

Filed May 21, 1908.

ED. C. O'REAR,

Chief Justice Court of Appeals of Ky.

354 And on said date there was filed in the office of the Clerk of the Court of Appeals a Writ of Error from the Supreme Court of the United States, and the order allowing same, by the Chief Justice of the Kentucky Court of Appeals, and which is attached hereto as follows, to-wit:

355 UNITED STATES OF AMERICA,
Eastern District of Kentucky, Sixth Judicial Circuit, ss:

The President of the United States to the honorable the judges of the Court of Appeals of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals, before you or some of you, between the Louisville & Nashville Railroad Company, appellant, *against* Spencer Melton, appellee, a manifest error hath happened, to the great damage of said Louisville & Nashville Railroad Company, as by its complaint appears, we being willing that error, if hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, District of Columbia, on the 20th day of June, next, in said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States the 21st day of May, in the year of our Lord
 356 one thousand nine hundred and eight, and of the independence of the United States of America, the one hundred and thirty-second.

[Seal 6th Circuit Court, Eastern Ky. Dis., U. S. of America.]

CHAS. N. WIARD,
*Clerk of the Circuit Court of the United States
 for the Eastern District of Kentucky, at
 Frankfort.*

Allowed May 21, 1908, by

ED. C. O'REAR,

Chief Justice Court of Appeals, Kentucky.

*Not exceeding 30 days from the date of signing the citation.

Filed May 21, 1908.

NAPIER ADAMS, C. C. A.

357 And on said date there was filed in the office of the Clerk of the Court of Appeals, a Writ of Error Bond, and which is in words and figures as follows, to-wit:

Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,

vs.

SPENCER MELTON, Appellee.

Know all men by these presents, that we, the Louisville & Nashville Railroad Company, as principal, and M. H. Smith and Attila Cox, as sureties, are held and firmly bound unto Spencer Melton in the sum of Thirty Thousand Dollars to be paid to the said Spencer Melton. To the payment of which well and truly to be made, we bind ourselves, and each of us jointly and severally, and our, and each of our heirs, executors and administrators, firmly by these presents.

Sealed with our seals, and dated this 15th day of May, A. D. 1908.

Whereas the above-named plaintiff in error, Louisville & Nashville Railroad Company, hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Court of Appeals of Kentucky, the highest court in said State.

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error, Louisville & Nashville Railroad Company, shall prosecute its said writ of error to effect, and answer all damages and costs, if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

LOUISVILLE & NASHVILLE
RAILROAD COMPANY,

By M. H. SMITH, *President*.

M. H. SMITH, *Surety*.

ATTILLA COX, *Surety*.

Sealed and delivered in presence of

ED. C. O'REAR,

Chief Justice Court of Appeals, Kentucky.

Filed May 21, 1908.

NAPIER ADAMS, *C. C. A.*

And afterwards on the 25th day of May, 1908, there was filed in the office of the Clerk of the Court of Appeals, the Original Citation, and proof of service endorsed thereon, and which is hereto attached as follows:

UNITED STATES OF AMERICA,

District of Kentucky, Sixth Judicial Circuit, ss:

To Spencer Melton, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington, in District of Columbia, on the 20th day of June, 1908, next, pursuant to a writ of error filed in the Clerk's

office of the Court of Appeals of Kentucky, wherein the Louisville & Nashville Railroad Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States this May 21st, in the year of our Lord one thousand nine hundred and eight, and of the Independence of the United States of America, the one hundred and thirty-second.

ED. C. O'REAR,
Chief Justice Court of Appeals, Ky.

Not exceeding 30 days from the day of signing.

Service of citation accepted.
May 22, 1908.

CLAY & CLAY,
Attorneys for Spencer Melton.

Filed May 25, 1908.
NAPIER ADAMS, C. C. A.

361 THE COMMONWEALTH OF KENTUCKY,
The Court of Appeals, act:

In obedience to the commands of the attached Writ of Error, I hereby transmit to the Supreme Court of the United States, a complete transcript of the entire record, with all things touching the same, as appears from the records and files of my office.

In testimony whereof, I have hereunto set my hand and affixed my official seal. Done at the Capitol at Frankfort on this the 11 day of June, A. D. 1908.

[Seal Kentucky Court of Appeals.]

NAPIER ADAMS,
Clerk Court of Appeals of Kentucky.

362 Transcript \$106.50.

Endorsed on cover: File No. 21,231. Kentucky court of appeals. Term No. 435. The Louisville & Nashville Railroad Company, plaintiff in error, vs. Spencer Melton. Filed June 16th, 1908. File No. 21,231.



Office Supreme Court

FILED

OCT 14 19

JAMES H. MCKEN

Supreme Court of the United States,

OCTOBER TERM, 1908.

No. [REDACTED] 180.

THE LOUISVILLE & NASHVILLE
RAILROAD COMPANY, - - - Plaintiff in Error,

vs.

SPENCER MELTON, - - - Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR IN OPPOSITION
TO THE MOTION OF DEFENDANT IN ERROR
TO DISMISS AND AFFIRM.

BENJAMIN D. WARFIELD,

Counsel for Plaintiff in Error.

HENRY LANE STONE,

CLIFTON J. WADDILL,

Of Counsel.



Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 435.

THE LOUISVILLE & NASHVILLE
RAILROAD COMPANY,

Plaintiff in Error.

vs.

SPENCER MELTON,

Defendant in Error.

**Brief of Plaintiff in Error in opposition to the motion
of Defendant in Error to dismiss and affirm.**

STATEMENT OF THE CASE.

The defendant in error, Spencer Melton, sued the plaintiff in error, the Louisville & Nashville Railroad Company, in the Circuit Court of Hopkins County, Kentucky, for damages for personal injuries, and recovered a judgment for \$22,000 dollars, and which judgment was affirmed by the Court of Appeals of Kentucky, the court of last resort of that State. The case is in this Court on a writ of error to the latter court.

Defendant in error predicated his right to recover upon the Employers' Liability Statute of Indiana, (R. pp. 7-8) he having received his hurt in that State while employed by plaintiff in error, as a carpenter and while engaged in assisting other carpenters in the erection of a wooden coal tipple or coal chute alongside of, but not upon, plaintiff in error's railroad. He was not engaged in railroad operation. His employment was attended with no greater hazard because he was exer-

cising his vocation for a railroad than it would have been had he been working for any other class of employer.

SPECIFICATION OF ERROR.

The Court of Appeals of Kentucky erred in holding that the Employers' Liability Statute of Indiana can be constitutionally applied to the facts of this case. When so applied the statute violates section 1 of Amendment 14 of the Constitution of the United States. In order to uphold the Indiana statute, which has been construed by the Supreme Court of that State to be applicable to railroads alone, the statute must be construed as applying only to cases of injuries to railroad employes engaged in the extra-hazardous branches of railroad service; to those railroad employments which are more hazardous than employments in any other business. The applicability of the statute must be made to depend upon the character of the employment and not on the character of the employer. The defendant in error was employed as a carpenter, and, at the time he received the injuries sued for, was engaged in doing ordinary carpenter's work in connection with the erection of a coal tippie or chute at the Ingle Coal mines, close to, but not on or forming a part of, the railroad of the plaintiff in error, in Indiana. The work defendant in error was doing was no more dangerous to him, merely because he was employed by a railroad company, than if he had been doing the same character of work for an employer other than a railroad company. In the latter event, admittedly the statute would not apply, and there would be no liability under the common law of Indiana. We, therefore, contend that the action of the Court of Appeals of Kentucky in holding the Indiana statute applicable to this case—in holding that defendant in error is entitled to recover under the statute—violates Section 1 of the Fourteenth Amendment of the Constitution of the United States, in that it deprives the plaintiff in error of its property without due process of law, and denies to said plaintiff in error the equal protection of the laws. As thus applied, the statute is class legislation, in that the attempted classification

of railroads by themselves does not rest upon some difference which bears a reasonable and just relation to the act in respect of which the classification is proposed, but is an arbitrary selection. Moreover, the Supreme Court of Indiana, had the case been before that court instead of before the Court of Appeals of Kentucky, would not have applied the Indiana statute to this case, in view of its opinions construing the statute. This Honorable Court will accept, and the Court of Appeals of Kentucky should have accepted, but did not, the construction which the Supreme Court of Indiana has placed on said statute.

BRIEF AND ARGUMENT.

Plaintiff in error, by proper pleadings, challenged the constitutionality of the Indiana Employers' Liability Act as applied to the facts of this case. Plaintiff in error does not question the right of the Legislature of Indiana to classify railroads in order to impose liability upon them for injuries to their employes incident to railroad hazards. But it does insist that to make this a constitutional exercise of legislative power, the liability of the railroad must be made to depend upon the character of the employment, and not upon the character of the employer. And plaintiff in error denies the right of the legislature to classify *all* railroad employes and impose liability against their employers and in behalf of such employes, merely as such, without reference to whether the employe is exposed to hazards which are peculiar to the operation of railroads and which do not appertain to other vocations.

In order to sustain such class legislation, and to save it from the condemnation of Section 1 of the 14th Amendment to the Constitution of the United States, such statute must, either by its terms or by judicial construction, be limited so as to apply only in behalf of railroad employes who are exposed to railroad hazards; to those dangers which are peculiarly incident to the operation of railroads, but which are not incident to any other business or vocation. When so limited, such legislation is valid. But when it attempts to go further and impose liability upon railroad companies alone, and

in behalf of all of their employes alone, regardless of whether or not their employments are peculiarly hazardous, such legislation is invalid, as applied to employments that are not extra-hazardous. It must be admitted that many employes of railroads are exposed to no greater dangers or hazards than are employes in other than railroad employments.

No one would question the power of a State legislature to enact a statute abolishing the common law doctrine of fellow-servants and assumed risks as to every employe in the State. But when the legislature does not do this, but, instead, enacts a statute, partial in its operation, and making one class only of employes the recipients of the legislative bounty, the classification thus made cannot be sustained unless it rests upon some reasonable basis. As was said by the Supreme Court of Iowa in *Akeson v. R. Co.*, 106 Iowa 54, 75 N. W. 676, in construing a statute of that State similar to the Indiana statute involved in this case, "The purpose of the lawmakers was evidently not to make men, because employed by railroad companies, favorites of the law, but to afford protection owing to the peculiar hazards of their situation."

And, furthermore, plaintiff in error contends that defendant in error, although employed by the railroad company, was not engaged in an extra-hazardous employment—one peculiar to railroads—such as to justify the application of the statute as to him.

The brief for the defendant in error concedes that the constitutional question is properly raised, and that this Court has jurisdiction of this writ of error.

But in the motion of the defendant in error, and in the brief filed in support of the motion, the Court is asked to dismiss the writ of error and affirm the judgment upon the grounds that, "(1) It is manifest the writ of error was sued out for delay only; (2) The question on which the jurisdiction depends is so frivolous as not to need further argument."

The affirmance of the judgment by the Court of Appeals of Kentucky carried with it not only the payment of the very large judgment of \$22,000, but also 10% damages, and interest at 6% per annum from the date of the rendition of the judgment. The plaintiff in error could not

afford to prosecute an appeal or a writ of error in any case solely for the purpose of delaying payment of the judgment, because its money is not worth to it 6% per annum, the rate of interest which Kentucky judgments bear. As a matter of fact, plaintiff in error does not, and never has, prosecuted appeals for any such purpose. Nor was this writ of error prosecuted for any such purpose.

We do not know just what counsel for defendant in error had in mind in stating, as the other ground of their motion, that, "the question on which the jurisdiction depends is so frivolous as not to need further argument." The last six words of the sentence would indicate that the question presented for decision on this writ of error has heretofore been decided by the Court. It has not. Nor can we find that it has ever been raised in argument in any case before this Court. Therefore, since this Court has not only not decided the question, but has heard no argument upon it, it is difficult to know at what opposing counsel are driving when they state so dogmatically that the question presented needs no further argument. And, we think we may be pardoned for saying that we do not think any question involving the rights guaranteed by the Fourteenth Amendment to the Constitution of the United States can properly be characterized as "frivolous."

Opposing counsel, while disclaiming the right to file a brief in support of their motion, have filed one. Hence no apology is necessary from us for filing this brief in opposition to the motion. In fact, our understanding is that the Court expects counsel to brief, but not orally argue, motions of this character.

While admitting that this Court has jurisdiction of this writ of error, the argument is put forward by the other side that, inasmuch as the Court, in *Tullis v. L. E. & W. R. Co.*, 175 U. S. 384, upheld the constitutionality of the statute involved in this case, *as applied to the facts in that case*, it is no longer competent for any railroad sued under the Indiana statute to question its constitutionality as applied to the facts of *any other case*, regardless of what may be shown as to the character of the employment of the injured employe seeking the benefit of the statute. We take issue with this contention.

Our question was not decided in the Tullis case. It was not raised in that case. Nor has it ever been either raised or decided in any other case before this Court, so far as we are informed.

In the Tullis, Mackey and other cases in this Court, and referred to in the brief on the other side and in this brief, the question decided was whether it was competent for State legislatures to classify railroads by themselves, *for any purposes*, and enact statutes imposing liability on them not imposed on other corporations or on individuals. The Court undoubtedly gave the correct answer to this question in *M. P. Ry. Co. v. Mackey*, 127 U. S. 205, when it said: "But the hazardous character of the business *of operating a railway* would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employes as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employes, and no objections, therefore, can be made on the ground of its making an unjust discrimination." (Our italics.) Mackey was a locomotive fireman on one engine, and was injured by the negligent movement of another engine by the engineer thereof. Mackey's employment was unquestionably of a "hazardous character" in connection with "operating a railway." Conceding that it is constitutional for State legislatures to classify some classes of railroad employes and make them the beneficiaries of employers liability statutes, partial in their operation, we could not conceive of any statute that could be so drawn as to exclude from its benefits an employe injured as Mackey was injured; or as Tullis was injured; or as Montgomery was injured. (see *intra*.)

While the opinion in the Tullis case does not show the character of his employment, it does appear in the report of the case as decided by the United States Circuit Court of Appeals for the Seventh Circuit, 105 Fed. 554, that Tullis was employed as a freight train brakeman, and was injured while so employed, and while riding in the cupola of a caboose, by the negligence of the engineer of a pusher engine, which was to push Tullis' train over a steep part of the railroad, and which engine

so violently collided with the caboose as to throw it from the track, whereby Tullis was injured.

In *P. C. C. & St. L. Ry. Co. v. Montgomery*, 152 Ind. 1, in which the construction was given to the Indiana statute which was followed by this Court in the Tullis case, Montgomery was a railroad brakeman, and was injured by the negligence of an engineer. No question was made, or could have been made in that case, (any more than in the Tullis case which followed it in construing the Indiana statute, or in the Mackey case construing the Kansas statute), that Montgomery was not engaged in an employment of an extra-hazardous character. He, Tullis and Mackey were all manifestly so engaged, if any railroad employment can be said to be extra-hazardous—more so than any other vocation. Therefore, there was no room in those cases for the question we are raising here. And the question was not raised.

The constitutionality of the Indiana statute in the Montgomery and Tullis cases, and of the Kansas statute in the Mackey case, was challenged *in toto*. The argument was that a State legislature had no right to enact a statute imposing liability on railroads alone as to *any* of their employes. All that this court has decided, as we read the opinions, is that it is competent to provide a right of action in favor of railroad employes who are *exposed to the hazards of operating railroads*, when no similar legislation is enacted in behalf of persons engaged in pursuits other than railroad work. But the courts have never said, as they must have done to support the contention of opposing counsel, that a State legislature may, without violating the Fourteenth Amendment, provide a right of recovery in behalf of *every* railroad employe, as such, and without reference to whether his occupation is extra-hazardous or whether he is employed in operating a railroad—when no similar remedy is afforded to the employes of any other character of employer, either corporation or individual.

Unless the Indiana statute is construed as embracing only those employes of railroad companies who are engaged in the hazardous branches of the railroad service—who are engaged in *operating* railroads—it plainly contravenes the Fourteenth Amendment. To construe

the statute otherwise, and as contended for on behalf of defendant in error, would be to bring within its influence, unjustly and illogically, the 80% of railroad employes who are not engaged in hazardous occupations, whereas it does not bring within its influence the many thousands of employes engaged in hazardous occupations for employers other than railroads. The statute, as narrowed by the construction which has been placed upon it in *Pittsburg, etc. R. Co. v. Lightheiser*, 168 Indiana 438; *Bedford Quarries Co. v. Bough*, *Id.* 671, (decided since the *Montgomery and Tullis* cases,) imposes liability upon railroads, and in behalf of their employes, only. Every other employer of labor in Indiana, except a railroad company, is protected from liability to employes by the common law defenses of fellow-servants and assumed risks. (*Southern Indiana Ry. Co. v. Harrell*, 161 Indiana, 689, (R. p. 118); *I. & G. R. Co. v. Foreman*, 162 Indiana 85, (R. p. 129); *New Pittsburg C. & C. Co. v. Peterson*, 136 Indiana, 398, (R. p. 125.)) There is no statute in that State relating to or affecting the liability of the master to the servant, except the Employers Liability Act we are considering.

Lightheiser was a railroad employe in a hazardous branch of the railroad service. He was hurt as a result of train operation. The Indiana court held, and properly so, that he came within the statute. Bough was employed by a quarry company. The Indiana court held that he did not come within the statute; that, thenceforward, it was to be construed as aimed at railroads alone; and that, to justify it as to them, it should be restricted so as to apply in favor of those railroad employes only who were exposed to railroad perils—to the hazards peculiar to the operation of railroads. Unless this is done the statute will unjustly discriminate in favor of employes of railroads whose employments are not attended with extra hazards, and unjustly discriminate against laborers in vocations other than railroad-ing whose employments are quite as, if not more hazardous, than those of at least 80% of railroad employes.

From the annual report of the Interstate Commerce Commission of 1905 (p. 83,) we learn that railroad employes for the entire country, for the year ending June 30, 1904, numbered 1,296,121. Of these employes 52,451

were enginemen, 55,004 firemen, 39,645 conductors, and 106,734 other trainmen. In other words, 253,834 men were engaged in operating railroad trains or engines of some sort, while 1,042,287 were otherwise employed upon the railroads of this country. In short, the men operating railroad trains did not constitute one fifth, or twenty per cent of the men employed by the railroads.

For the purpose of expressing relatively the greatly varying extent of risk which experience has taught is involved in the insurance of persons pursuing different occupations, accident insurance companies have divided occupations into the following classes, each expressing a different degree of risk, beginning with that class which is least hazardous: Select, Preferred, Ordinary, Medium, Special, Hazardous, Extra Hazardous, Special Hazardous, and Extra Special Hazardous. Under this classification steam railroad employes are divided into 313 classes. (Accident Insurance Manual, pp. 365-371.) Of these 46 are denominated Hazardous, 8 Extra Hazardous, none Special Hazardous, none Extra Special Hazardous, and 7 are specified as being governed by special contracts. Thus but 61 out of 313 classes of steam railroad employes, or approximately 19%, are engaged in work which is deemed hazardous by accident insurance companies; 33 classes, or 10½%, are deemed select risks, this being the highest class. Under the classification above referred to, an accident insurance company unquestionably would not have regarded defendant in error as engaged in a hazardous service.

As we have said, except as modified by the Employers Liability statute of Indiana, approved March 4, 1893 (Burns Annotated Indiana Statutes, Revision of 1901, secs. 7083-7087, inclusive pages 604-606, Record pages 7, 8) the common law of fellow servants and assumed risks still obtains in that State.

The statute, as enacted, was directed against "all railroads or other corporations, except municipal," operating in Indiana.

The Supreme Court of that State seems to have recognized, from the time the constitutionality of the statute was first questioned in that Court, that one of two courses must be pursued: (1) to hold that the statute

was too broad, and, following the rule which has often been declared by this Court, notably in the *Employers Liability Cases*, 207 U. S. 463, and the cases cited in that opinion on page 477, and in *Ballard v. Mississippi Cotton Oil Co.*, 81 Miss. 507, 62 L. R. A. 407, refuse to make, by judicial construction, a statute which the legislature had not made—refuse to cut the statute down by construction, so as to bring it within constitutional limits—and declare the statute unconstitutional; or (2) to so limit the operation of the statute by construction as to bring it within constitutional limits. That court adopted the latter course.

In thus cutting down the statute the legislature had made, so as to hold that it applied only to railroads, although the legislature had made it apply to all corporations, except municipal, the Supreme Court of Indiana realized that the statute could not be constitutionally applied to railroads, merely as such. In other words, the reasoning of the Indiana Court, in the cases cited, is, and our argument here is, that it is contrary to the Fourteenth Amendment to the Constitution of the United States for the State legislature to enact statutes aimed against one class of persons only, and leaving all other classes of persons subject to the more favorable rules of the common law, unless, as was held by this Court in *G. C. & S. F. Ry. Co. v. Ellis*, 165 U. S. 150, the basis of the attempted classification rests “upon some difference which bears a reasonable and just relation to the Act in respect to which the classification is proposed,” and is not made arbitrarily and without such basis.

The defendant in error was not engaged in an extra-hazardous employment. He was not injured in the operation of a railroad. The carpenter's work he was doing for plaintiff in error was no more hazardous because he was employed by a railroad company than it would have been if he had been working for an individual or for a corporation other than a railroad company. He was one of a gang of seven laborers, including Shroadess, the foreman, who were erecting a coal tippie or chute. At the time of the accident they were raising, with ordinary pulley, block and tackle, a bent of timber weighing about 1000 to 1200 pounds from a partly horizontal to an up-

right position. The bent fell, as the weight of the testimony shows, by reason of a latent defect in the welding of one of the links of a chain by which one of the pulley blocks was temporarily attached to the framework. We think opposing counsel are in error in contending that the defect was patent. Defendant in error was caught by the falling timber and received the injuries for which he brought this action under the Employers' Liability Act of Indiana.

The work which was then being done was such as any carpenter performs in the erection of a house or other structure requiring the use of wooden beams, sills, etc. Defendant in error was exposed to no more peril in doing that character of work for a railroad company than he would have been exposed to had he been assisting in erecting a like structure for a coal mine, or for a coal merchant. There was nothing in the fact that the coal chute was to be used, *after it was completed*, in coaling railroad engines which made it any more dangerous to the workmen who erected the coal chute, than if they had been erecting a coal tippie or coal chute of identically or practically the same character for a coal mining company, or individuals operating a coal mine, or for a corporation or an individual engaged in buying and selling coal, and having coal yards, tipples, chutes, etc., for that purpose. Yet, it is admitted that if defendant in error had been doing precisely the same work for any employer other than a railroad company, he would not have been entitled to recover either under the statute, or by the common law of Indiana. Can the statute be constitutionally applied as to him, merely because he was employed by a railroad company at the time he received the hurt, when he would be wholly without remedy against his employer if he had been injured while doing the identical work for any character of employer other than a railroad?

The question is well answered in cases to be hereafter noticed.

Inasmuch as the opinion of the Supreme Court of Indiana in the Bough case is rested upon what was decided by this Court in the Ellis, Cotting, Connelly, Kline, Tullis, Mackey, Herrick, Yick Wo and other cases, as well as upon what was decided by the Supreme Courts

of Iowa, Minnesota and Kansas in the cases to which we will direct the Court's attention, it becomes material to ascertain what was decided in those cases.

In the *Ellis* case, *supra*, the question was as to whether a Texas statute which imposed an obligation on railroad companies to pay an attorney's fee in certain cases mentioned in the statute, whereas no similar liability was imposed by the laws of that State on other litigants, was constitutional. This Court held that the statute violated the Fourteenth Amendment, and said:

"While good faith and a knowledge of existing conditions on the part of a Legislature is to be presumed, yet to carry that presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation is to make the protecting clauses of the Fourteenth Amendment a mere rope of sand, in no manner restraining State action.

"It is well settled that corporations are persons within the provisions of the Fourteenth Amendment of the Constitution of the United States (citing many cases.) The rights and securities guaranteed to persons by that instrument can not be disregarded in respect to these artificial entities called corporations any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations. A State has no more power to deny to corporations the equal protection of the law than it has to individual citizens.

"But it is said that it is not within the scope of the Fourteenth Amendment to withhold from States the power of classification, and that if the law deals alike with all of a certain class, it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true (citing many cases,) yet it is equally true that such classification can not be made arbitrarily. The State may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men

possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

Again on page 159, the Court said:

"But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews, speaking for this Court, in *Yick Wo v. Hopkins*, 118 U. S. 356, 369: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.' The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty, and the pursuit of happiness.' While such declaration of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government."

And again on page 165 the Court said:

"It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of

the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection. Tested by these principles, the statute in controversy can not be sustained.”

In *Cotting v. Kansas City Stock Yards Company*, etc. (183 U. S., 79,) the Court held that a statute of Kansas violated the Fourteenth Amendment to the Constitution of the United States in that it applied to the Kansas City Stock Yards Company but did not apply to other companies or corporations engaged in like business in Kansas.

The Court in the opinion in the *Cotting* case, quoted approvingly from the Supreme Court of Kansas in *State v. Haun* (61 Kansas, 146,) where a statute of that State, which provided for payment of laborers in money, etc., was held unconstitutional on the ground that it was obnoxious to the Fourteenth Amendment to the Constitution of the United States, as follows:

“ ‘Everyone has a right to demand that he be governed by general rules, and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments. Those who make the laws “are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plow.” This is a maxim in constitutional law and by it we may test the authority and binding force of legislative enactments.’ ”

In *Connelly v. Union Sewer Pipe Company* (184 U. S. 540,) the anti-trust statute of Illinois (1893) was held to be unconstitutional because it violated the Fourteenth Amendment to the Constitution of the United States. The statute contained a section exempting from

its operation agricultural products or live stock, while in the hands of the producer or raiser.

The Court said:

“ The difficulty is not met by saying that, generally speaking, the State, when enacting laws, may, in its discretion, make a classification of persons, firms, corporations, and associations in order to subserve public objects. For this Court has held that classification ‘must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed and can never be made arbitrarily and without any such basis. * * * But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. * * * No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification and is not a mere arbitrary section.’ ”

In *Adair v. United States*, 208 U. S. 161, the Court held section 10 of the act of Congress of June 1, 1898, unconstitutional and void. By that section Congress attempted to make it a misdemeanor against the United States for an employer, or its officer or agent, among other things, to threaten any employee with loss of employment, or unjustly discriminate against any employee because of his membership in a labor organization. During the course of the opinion of the Court, delivered by Justice Harlan, it was said:

“It may be observed, in passing, that while that section makes it a crime against the United States to unjustly discriminate against an employee of an inter-

state carrier because of his being a member of a labor organization, it does not make it a crime to unjustly discriminate against an employee of the carrier because of his not being a member of such organization."

And again:

"The first inquiry is whether the part of the tenth section of the act of 1898 upon which the first count of the indictment was based is repugnant to the Fifth Amendment of the Constitution, declaring that no person shall be deprived of liberty of property without due process of law. In our opinion, that section in the particular mentioned is an invasion of the personal liberty, as well as of the right of property, guaranteed by that amendment."

The Fourteenth Amendment imposes certainly as great restraint on State action as the Fifth Amendment imposes on Federal action.

And again, it was said in the Adair case:

"We need scarcely repeat what this Court has more than once said—that the power to regulate interstate commerce, great and paramount as that power is, can not be exerted in violation of any fundamental right secured by other provisions of the Constitution. (*Gibbons v. Ogden*, 9 Wheat. 1. 196; *Lottery Case*, 188 U. S. 321, 353.)"

UNLESS THE STATUTE IS LIMITED BY CONSTRUCTION
SO AS TO EXCLUDE DEFENDANT IN ERROR FROM
ITS OPERATION IT IS UNCONSTITUTIONAL AND VOID.

The earliest of the State statutes which altered the common law rules of fellow-servants and assumed risks was the Iowa statute of 1862 (Code, 1872, Sec. 1707) which provided:

"Every corporation operating a railway shall be liable for all damages sustained by any person, including employees of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers or other employees of the corporation, and in

consequence of the wilful wrongs, whether of commission or omission, of such agents, engineers or other employes, when such wrongs are in any manner connected with use and operation of any railway on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding."

The Supreme Court of Iowa, in order to uphold the constitutionality of this statute has "cut it down" by construction and holds that it applies only to those dangers which are peculiar to railroad operation—those occasioned by the movements of engines, cars and machinery on tracks, or directly connected therewith. (*Akeson v. R. Co.* 106 Iowa, 54, 75 N. W. 676.)

During the course of that opinion this language was used:

"The peculiarity of the railroad business which distinguishes it from any other is the movement of vehicles or machinery of great weight on the track by steam or other power, and the dangers incident to such movements are those the statute was intended to guard against. If, then, the injury is received by an employe whose work exposes him to the hazards of moving trains, cars, engines, or machinery on the track, and is caused by the negligence of a co-employe in the actual movement thereof, or in any manner directly connected therewith, the statute applies, and recovery may be had. Beyond this the statute affords no protection. The purpose of the lawmakers was evidently not to make men, because employed by railroad companies, favorites of the law, but to afford protection owing to the peculiar hazards of their situation."

In the *Akeson* case it was held that the statute did not apply in favor of a person employed to coal engines from coal cars alongside, by carrying coal from the car to the engine tender in wheelbarrows, over planks laid as a footway or runway from the car to the tender, and who was injured by the negligence of a co-servant in removing a plank over which the wheelbarrows were operated.

In *Luce v. R. Co.* (67 Iowa, 75; 24 N. W. 600,) the plaintiff was employed in a coal house of a railroad

company, and, while hoisting coal for the purpose of coaling an engine was struck by the crane by which the coal was hoisted, due to the negligence of a co-servant. It was held that the statute did not apply, the court saying:

"The danger arising from the use of the crane does not appear to have been greater or less by reason of the fact that it was used in loading a railroad car. Nor does it appear that the plaintiff, while engaged in his duties, was exposed to any danger from the operation of the road."

In *Foley v. R. Co.*, (64 Iowa, 644; 21 N. W. 124), a recovery was denied to a car repairer for injuries he received while repairing a car on a side track, by reason of the alleged negligence of a co-employee in failing to block the wheels of the car. The Court declared that with the single exception of *Deppe v. R. Co.*, (36 Iowa 52,) in which a recovery was allowed to an employee injured while shoveling earth into flat cars, by the caving in of a bank of earth, the only cases in which the Court had held railroad companies liable under the statute were those where the injury was received by the movements of cars or engines upon tracks.

And, in the *Deppe* case, the Court said:

"The manifest purpose of the statute was to give its benefits to employees engaged in the hazardous business of operating railroads. When thus limited it is constitutional; when extended further, it becomes unconstitutional."

In *Stroble v. R. Co.*, (70 Iowa 555, 31 N. W. 63), the same Court denied a recovery to an employee of a railroad company who was injured by the giving way of certain steps leading up to a platform for loading coal. The Court said that the evidence failed to show that the plaintiff and any co-employee whose duty could have required him to keep the steps in repair had anything to do with the use and operation of the railroad, and further said:

"The coal house and stairs were a part of the con-

trivances for placing fuel within easy reach of defendant's locomotives, and employes charged with any duty pertaining thereto had no connection with the use and operation of the railroad which is contemplated by the statute. It is true, there is a remote connection, as there is in the case of a coal miner or teamster who hauls the coal,—all being employed in work which in the end will supply the coal to the locomotive; but this is not the connection contemplated by the statute. This negligence, to render the corporation liable, must be of an employe, and affect a co-employe, who are in some manner performing work for the purpose of moving a train, as loading or unloading it, superintending, directing or aiding its movement. The persons must be connected in some manner with the moving trains. Work preparatory thereto, which may be done away from a train, is not connected with its movement."

In *Malone v. R. Co.*, (65 Iowa, 417, N. W. 756), it was held that an employe of a railroad company, employed in wiping off engines, opening and closing the doors of the engine-house, removing snow from the turntable and tracks, and turning the turntable when engines were being run between the main track and the engine-house, was not engaged in the operation of the railroad, within the statute, and was not entitled to recover for an injury caused by the negligence of a fellow-servant while attempting to open the doors of the engine-house.

In *Reddington v. R. Co.*, (108 Iowa, 96, 78 N. W. 800), it was held that the railroad was not liable to a brakeman for injuries received while he was assisting in coaling an engine, through the negligence of a co-employe in operating the hoisting crane so as to knock him from the platform—such movement not being necessary in order to permit the train to start. The *Reddington* case was decided in 1899—about 37 years after the employer's liability statute of Iowa was first enacted, and after the Supreme Court of that State had construed that statute in a great many cases, a number of which were reviewed in the opinion in the *Reddington* case.

If *Stroble*, *Akeson*, *Luce*, *Foley*, *Malone* and *Reddington* were not entitled to recover under the Iowa statute, surely defendant in error, in the case at bar, is

not entitled to recover under the Indiana statute, which this Court, in effect, held in *Tullis v. L. E. & W. R. Co.* 175 U. S. 348, *supra*, was substantially similar to the Iowa statute, and to the Minnesota and Kansas statutes hereafter to be noticed. The Indiana Court, in the *Lightheiser* and *Bough* cases, held the same way. In the Iowa cases mentioned, the injured employes were engaged in work very much more nearly incident to the operation of a railroad than was defendant in error in the case at bar.

The Employers' Liability Act of Minnesota (Ch. 13 Gen. Laws, 1887,) declares:

"Every railroad corporation owning or operating a railroad in this State shall be liable for all damages sustained by any agent or servant thereof, by reason of the negligence of any other agent or servant thereof, without contributory negligence on his part, when sustained within this State; and no contract, rule, or regulation between such corporation and any agent or servant shall impair or diminish such liability: *Provided*, That nothing in this act shall be so construed as to render any railroad company liable for damages sustained by any employe, agent, or servant while engaged in the construction of a new road or any part thereof not open to public travel or use."

The Supreme Court of Minnesota has construed the statute as applying only to those employes of railroads who are engaged in the *operation* of railroads.

In *Lavallee v. R. Co.* (40 Minn., 249; 41 N. W. 974), the opinion by Chief Justice Gilfillan does not show the precise nature of *Lavallee's* employment. The opinion does say, however, that he and the persons through whose negligence he received the injury from which he died, were fellow-servants. The Court, after stating that the question for decision was whether the statute includes all employes, agents and servants of a railroad corporation, without regard to the character of the business in which they were employed, declared that, while taken literally, the statute did so, it was evident that the statute could not be taken literally. After referring to the decisions of the courts of last resort of some of the other

States which had enacted similar statutes including *McAunich v. R. Co.*, Iowa, 338 and *Deppe v. R. Co.*, 36 Iowa, 52, and quoting approvingly from *R. Co. v. Mackey*, 127 U. S., 205, where the character of the employe injured was such that no question could be made that he came within the provisions of the Kansas statute, if it was to be given any effect whatever, and after discussing the power of legislatures to classify subjects of legislation, the Court said, respecting the Minnesota statute:

"Applying this test, it is impossible to avoid the conclusion that the statute, if construed as appellant claims it ought to be, would be class legislation, not applying upon the same terms to all in the same situation, nor having any apparent natural reason for any distinction.

"The frequency and magnitude of the dangers to which those employed in operating railroads are exposed; the difficulty, sometimes impossibility, of escaping from them with any amount of care, when they come; the fact that a great number of men are employed, co-operating in the same work, so that no one of them can know all the others, their competency, skill, and care, so that he may be said to voluntarily assume the risk arising from the want of skill or care by any one of the number—are a sufficient reason for applying a rule of liability on the part of the employer to the employe so employed different from that ordinarily applied between master and servant. But no just reason can be suggested why such difference should be founded, not on the character of the employment, nor of the danger to which those employed are exposed, but on the character only of the employer. We can see why the employer's liability should be greater when the business is that of operating a railroad, but can not see why one individual or corporation should be held to a rule of liability different from that applied to another, when the employment and its hazards are precisely the same. We can not illustrate this better than by using an illustration employed by the Supreme Court of Iowa in *Deppe v. R. Co.*, (36 Iowa, 52): 'Suppose a railroad company employ several persons to cut the timber on its right of way where it is about to extend its road, and the landowner employs a like number of persons to cut the timber on a strip of equal length along-

side such right of way. If one of each set of employees shall be injured by the negligence of a co-employee, and the railroad employee can, under the statute, maintain an action against his employer and the other can not, then it is clear that the law does not apply upon the same terms to all in the same situation.' "

And the Court held that the statute was to be confined in its operation to cases of employees engaged in operating a railroad, and necessarily exposed to the hazards attending that business, and not to embrace the cases of all employees of a railroad company, without regard to the kind of work in which they are engaged; and held there could be no recovery for Lavallee's death.

In *Johnson v. R. Co.*, (43 Minn. 222; 45 N. W. 156, 8 L. R. A. 419), a crew of men, of whom the plaintiff was one, were engaged in repairing a bridge on defendant's railroad. In performing the work it was necessary to leave the draw partly open. Through the negligence of one of the crew the draw was left unfastened, was blown partly shut by the wind, and injured plaintiff while he was at work between the stationary part of the bridge and the draw. It was held that the statute did not apply and that the railroad company was not liable to Johnson. The opinion of the court referred to what had been held in the Lavallee case, to the effect that the statute only applied to the peculiar hazards due to the use and operation of railroads, and must be so construed as though designed exclusively for the benefit of those whose employments expose them to such hazards, and whose injuries are caused by them, and said:

"And the more we consider the question the more we are confirmed in the opinion that it is only when construed as subject to some such limitation that the statute can be sustained as a valid law. As was said in the case referred to, to avoid the imputation of 'class legislation' the classification, in cases of special legislation, must be made upon some apparent natural reason, some reason suggested by necessity, by such a difference in the situation and circumstances of the subjects placed in different classes as suggests the necessity or propriety of different legislation with respect to them. If a distinction

is to be made as to the liability of employers to their employes, it must be based upon a difference in the nature of the employment, and not of the employers. One rule of liability can not be established for railway companies merely as such and another rule for other employes, under like circumstances and conditions. * * * Neither would it relieve the act from the imputation of class legislation that it applies alike to all railroads. It has been sometimes loosely stated that special legislation is not class 'if all persons brought under its influence are treated alike under the same conditions.' But this is only half the truth. Not only must it treat alike under the same conditions all who are brought 'within its influence,' but in its classification it must bring within its influence all who are under the same conditions. Therefore, if a distinction is to be made between railroad corporations and other employes, as respects their liability to their employes, it must be based upon some difference in the nature of the employment, and can only extend to cases where such difference exists. Hence most courts, as notably in Iowa and Kansas, have held that similar statutes, although general in their terms, embrace only 'the peculiar hazards of railroading.' * * *

"Therefore, after mature consideration, our conclusion is that, if any limitation is to be placed by the courts upon the application of this statute (and on constitutional grounds there must be), the only one which will furnish any definite or logical rule is to hold that it only applies to those employes who are exposed to the peculiar hazards incident to the use and operation of railroads, and whose injuries are the result of such dangers. * * * Applying the test suggested, it is plain that plaintiff's case is not within the provisions of the act. * * * As suggested by counsel for defendant, suppose there had been a wagon bridge over the St. Louis River alongside of this railroad bridge and one of the crew engaged in repairing it had been injured under like circumstances. He could not have recovered from his employer. Yet the actual situation, both as to the nature of the employment and the cause of the injury would have been the same in either case."

In *Jemming v. R. Co.*, 96 Minn., 302, 104 N. W., 1079. the plaintiff was injured while employed by the railroad

company as a pitman. He was one of a crew of nine men, consisting of an engineer, a craneman, a fireman, two jackmen and four pitmen, who were operating a steam shovel in a gravel pit operated by the railroad company. Jemming was injured by the negligent manner in which the engineer caused the bucket to swing from the ballast car into the pit. He sought to recover under the Minnesota statute. But it was held that the statute did not apply, for the reason that plaintiff and the fellow-servants by whose negligence he was injured were not engaged in operating a railroad at the time of the accident. The court also denied Jemming a right to recover on common law principles for the reason that he and those whose negligence caused his injury were fellow-servants.

After quoting approvingly from the Lavallee and Johnson cases the Court said of them:

"The rule, as thus established, that the statute includes only the class of servants exposed to injury by the dangers peculiar to the use and operation of railroads, has never since been departed from by this Court" (citing many cases).

The Minnesota statute was before this Court in *Minnesota Iron Co. v. Kline*, (199 U. S. 593). In that case the Supreme Court of Minnesota adjudged that Kline came within the operation of the statute. In the opinion this Court referred to the fact that the Minnesota court had held that the statute was confined to the dangers peculiar to railroads, and did not discriminate against railroad companies merely as such, and held that, inasmuch as the statute, as thus interpreted, was not within the prohibition of the Fourteenth Amendment, the Court would not interfere with the construction put upon the statute by the Supreme Court of Minnesota, and said:

"Of course there is no objection to legislation being confined to a peculiar and well-defined class of perils."

In *M. K. & T. R. Co. v. Medaris*, (60 Kan. 151; 55 Pac., 875) which was brought under the fellow-servant statute of Kansas, 1874 (Laws 1874, Ch. 93, Sec. 1), and which statute is quoted, 127 U. S., on p. 206, *ante*, the Supreme Court of Kansas held that the statute did not apply. Medaris was employed in setting a curbing around an office building and depot of the railroad com-

pany at Parsons, Kansas. The curbstones had been prepared elsewhere and shipped to Parsons and unloaded near the building around which they were to be placed. The men employed to set the curbing dug a ditch, and several of the curbstones were brought up and left on the side of the ditch, ready to be placed. While setting a curbstone, another one which had been left standing unsupported on the edge of the ditch was upset and fell upon one of Medaris' legs, causing a permanent injury. In reversing a judgment he obtained in the trial court, the Supreme Court of Kansas held that whether he was entitled to the benefit of the statute depended upon the character of the work in which he was engaged, and not on the mere fact that he was an employe of a railroad company; that the validity of the law had been sustained as against the charge that it was class legislation; on the ground that the hazardous character of the business of operating a railroad justified the passage of a law for the protection of those engaged in that service. The court then said:

"The rule of liability applied under the statute is different from that which ordinarily applies between master and servant; but this difference is founded on the hazardous character of the service and is not intended as a discrimination between employers. The statute would certainly be open to objection if a different rule of liability was applied to a railroad company than is applied to other employers under like circumstances and conditions. The hazards incident to the use and operation of railroads is a natural and reasonable classification, which justifies the exceptional legislation; for if the statute was not given that interpretation, and limited in its operation to the protection of those engaged in the hazardous service, it could not be upheld."

The court further said:

"He can only recover by showing that the service in which he was engaged exposed him to the peculiar perils incident to the operation of a railroad. * * * The work in which he was engaged involved no more risk or hazard than it would if the same work was being done for an individual at the same time and place. The benefits of the act can no more be claimed by him than

they could by the carpenter who laid the floor in the office building or nailed the shingles on its roof."

The court cited the Lavallee, Johnson, Deppe and Stroble cases, *supra*, and quoted approvingly from the former, and then, reaffirming what was held in *Ry. Co. v. Haley* (25 Kan. 53), that it was difficult to see how the validity of the law can be sustained unless it is interpreted to 'embrace only those persons more or less exposed to the hazards of the business of railroading,' declared that Medaris was not engaged in that kind of service when injured, and that there was no liability to him under the statute.

The Kansas statute was before this Court in *Missouri Pacific Ry. Co. v. Mackey*, (127 U. S. 205). Mackey was a locomotive fireman on one of the engines of the railroad company. He was injured in a negligent collision caused by the engineer of another engine. If the statute was to be given any effect whatever it was bound to be applied in favor of Mackey. He was unquestionably engaged in a hazardous branch of the railroad service. This Court, construing the statute in the light of the facts in that case, held that the statute did not violate the Fourteenth Amendment to the Constitution of the United States. Among other things, the Court said:

"But the hazardous character of the business of operating a railroad would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employes, as well as the safety of the public."

The statute was again before this Court in *Railroad Company v. Pontius*, (154 U. S. 209), and the Court met the argument that Pontius, a bridge builder, was not entitled to the benefits of the statute because it only applied to employes exposed to hazards peculiarly incident to the use and operation of railroads, by saying:

"He was engaged at the time the accident occurred not in building a bridge, but in loading timbers on a car for transportation over the line of defendant's road."

The clear implication was that if Pontius had been

working as a bridge builder the statute would not have been applied in his favor. If it would not, then *a fortiori* such a statute should not be applied in favor of a carpenter who was doing work much less hazardous than that of a railroad bridge builder, whose work was the simplest kind of carpenter's work.

The distinction was well drawn by Mr. Justice Brewer, in an opinion written by him as a member of the United States Circuit Court of Appeals for the Eighth Circuit, in *C. R. I. & P. R. Co. v. Stahley*, 62 Fed. 363, in which the Kansas statute, which the court held in the *Tullis* case was practically the same as the Indiana statute, was held to apply to a workman in a roundhouse who was injured while getting a locomotive ready for immediate use. Mr. Justice Brewer said:

"He was not engaged in repairing an old engine or constructing a new one, but in putting that engine, which had recently arrived, in condition for immediate use. He was * * * not engaged in any outside work remotely related to the business of the company; he was not cutting ties on some distant tract to be used by the company in preparing its roadbed, nor in mining coal for consumption by the engines, nor even in the machine shops of the company, constructing or repairing its rolling stock; but the work which he was doing was work directly related to the movement of trains—as much so as that of repairing the track."

The work which defendant in error was doing in assisting in erecting the coal tippie certainly did not directly relate to the movement of trains. If it could be called railroad work at all, it was merely outside work, remotely related to the railroad business—as much so as cutting ties, mining coal for consumption, constructing or repairing rolling stock in a machine shop, as stated by Mr. Justice Brewer, and not, therefore, a character of work embraced by the statute.

THE INDIANA STATUTE AND DECISIONS CONSTRUING IT.

On March 4, 1893, the Legislature of Indiana enacted an Employers' Liability statute, which is to be found in *Burns' Annotated Indiana Statutes*, Revision of 1901, sections 7083-7087, inclusive. That statute provides,

"That every railroad or other corporation, except municipal, operating in this State, shall be liable for damages for personal injury suffered by any employe while in its service in the following cases." Then follow descriptions of the four states of case in which the employer shall be liable. (R. pp. 7-8). The effect of the statute is to abolish the doctrines of assumed risk and fellow-servants as against the employers and in favor of the employes named in the statute.

In *I. U. Ry. Co. v. Houlihan*, 157 Indiana, 494, 60 N. E. 943, the Court held that the statute applied to a telegraph operator stationed at a track junction, and whose duties required him to cross the railroad tracks, and who, while so doing, was struck by a train running 20 miles an hour but which gave no warning of its approach. In answer to the argument made by counsel for the railroad that the subdivision of the statute under which the action was brought was in conflict with the equality clause of the Federal and State Constitutions, the Court, after briefly indicating the points made by counsel, answered, "It is competent for the Legislature, in the exercise of the police power, to take steps for the protection of the lives and limbs of all persons who may be exposed to dangerous agencies in the hands of others. The powerful forces in railroading, that are under the direction and control of those in charge of 'any signal telegraph office, switch yard, shop, round-house, locomotive engine or train upon a railway' were proper to be selected as sources of unusual danger which should be guarded against. * * * The Legislature evidently attempted to protect all persons who are not already protected from the negligent use of particular instrumentalities. The classification is made on the basis of the peculiar hazards in railroading."

The injury sued for in the case at bar did not grow out of any omission of duty imposed by that part of the statute involved in the decision of the *Houlihan* case.

In *Railroad Co. v. Lightheiser*, 168 Ind. 438, 78 N. E. 1033, the plaintiff was a passenger train engineer, and was standing between two railroad tracks where he had gone to take charge of his own engine, when he was knocked down and injured by another train of the railroad company, in the City of Logansport, Indiana. It

was held that the statute applied. In answer to the contention of the railroad company that the statute violated the Fourteenth Amendment to the Constitution of the United States, and referring to *Railroad Co. v. Montgomery*, 152 Ind. 1, where it was held that the statute was capable of severance, and thus, by putting railroads in a class by themselves, it might be sustained as to railroads, regardless of its unconstitutionality as to other corporations, the Court said:

"The classification of railroads by themselves was held proper in the cases above cited, on account of the dangerous and hazardous character of the business of operating the railroads. This classification is based, not on a difference in employers, but upon a difference in the nature of the employment. (*Indianapolis, etc. Ry. Co. v. Houlihan*, 157 Ind. 494, 501; 60 N. E. 943; 54 L. R. A. 787.) * * * Under the decisions cited, the character of the employers is not a controlling factor. The statute is to be given at least a reasonable interpretation, one that will carry into effect the legislative intent. * * * As we have shown, the basis of the classification of railroads by themselves was the hazardous and dangerous character of the employment of operating railroads, and this does not depend upon whether railroads are operated by corporations or by one or more persons. * * * The spirit and purpose of the statute must be looked to in interpreting the statute in controversy. As we have seen, the spirit and purpose of said Employers' Liability Act, so far as railroads are concerned, was the protection of employes engaged in the dangerous and hazardous work of operating railroads in this State, and we hold that it applies to every corporation, company, co-partnership, or person engaged in the dangerous and hazardous business of operating a railroad and their employes who are engaged in such dangerous and hazardous work."

In *So. Ind. Ry. Co. v. Harrell*, 161 Indiana, 262, 68 N. E. 262, the railway company was engaged in the construction of a railroad bridge over White River. A heavy stone was being lifted by a derrick. Three of Harrell's co-laborers were holding the stone away from the railroad track by means of a rope, after the stone was raised above the course on which it rested. Two of the men let

go the rope, and the third, being unable to hold the stone by himself, also abandoned the rope and sought a place of safety. The boom then swung around, and the chain which held the suspended stone caught on the running board of the pile driver. This caused the stone to swing east, and as it swung back it struck appellee, crushing one of his feet, and injuring the other. He sought a recovery under the Indiana statute, but the Supreme Court of that State held that as to him the statute was no broader than the common law, and that he was not entitled to recover either by virtue of the statute or the common law.

In *I. & G. R. Co. v. Foreman*, 162 Indiana, 85, 69 N. E. 669, the plaintiff, an employe of the railroad company, engaged in the construction of a track, was injured while being transported to his home in the work car of the company, by reason of the negligence of the employes of another train, whereby there was a collision between that train and the work train. The court denied Foreman a right to recover, either under the Indiana statute, or at common law, for the reason that he was injured by the negligence of a fellow servant.

In *Bedford Quarries Co. v. Bough*, 168 Ind. 671, 80 N. E. 520, decided March 1, 1907, the Court held that the statute, in so far as it applied to corporations other than railroad companies, violated the Fourteenth Amendment to the Constitution of the United States, as imposing on corporate employers burdens not imposed on individuals and partnerships. Bough was an employe of a quarry company, and was embraced by the terms of the statute. During the course of the opinion, the Court used this language:

“It is urged by appellant that said Employers’ Liability Act, except as applied to railroads, is in violation of the Fourteenth Amendment of the Constitution of the United States, and therefore void, for the reason that it imposes burdens upon private corporation employers that are not imposed on individual and co-partnership employers in the same business and under the same circumstances and conditions, and gives a right of action to the employes of private corporations that is not grant-

ed to the employes of individuals and co-partnerships under like conditions.

"Appellee insists that the legislature has the power of classification for legislative purposes, and that the classification in said act was proper. The legislature may make a classification for legislative purposes, but it must have some reasonable basis upon which to stand. It is evident that differences which would serve for a classification for some purposes would furnish no reason for a classification for legislative purposes. Such legislation must not only operate equally upon all within the class, but the classification must furnish a reason for and justify the making of the class, that is, the reason for the classification must inhere in the subject matter, and rest upon some reason which is natural and substantial, and not artificial. Not only must the classification treat all brought under its influence alike, under the same conditions, but it must embrace all within the class to which it is naturally related. Neither mere isolation nor arbitrary selection is proper classification."

And again:

"While the Employers' Liability Act, so far as it affects private corporations, applies to all within the class named therein, it does not include all of the class to which it is naturally related. Employes of individuals and copartnerships are excluded from the benefit of its provisions. It gives a right of action to an employe for injuries received while in the service of a private corporation in certain cases, but denies the employe of an individual or co-partnership, engaged in the same business, a right of action for an injury arising from the same cause and under the same conditions. It imposes new burdens on private corporations, while natural persons carrying on a like business and under like circumstances and conditions are left without any such burden. The right of action is made to depend upon the character of the employer, and not upon the character of the employment."

The opinion goes on to quote from *Ballard v. Mississippi, etc. Oil Co.*, 81 Miss. 507, 34 So. 533, 95 Am. St.

Rep. 476, 62 L. R. A. 407, which decided that a similar statute of Mississippi was unconstitutional; quotes the Minnesota statute, and from the Lavallee, Johnson, Kline and Jemming cases, *supra*; the Iowa statute, and from the Akeson and other Iowa cases, *supra*; the Lightheiser case, and Tullis v. L. E. & W. R. Co., 175 U. S. 348; Connelly v. Union Sewer Pipe Co., 184 U. S. 540, Yick Wo v. Hopkins, 118 U. S. 356; Gulf C. & S. F. Ry. Co. v. Ellis, 165 U. S. 150, and other cases, and then uses this language:

"In view of this, everyone must realize that there is a reasonable ground for the essential idea of the employers' liability legislation; but the fact must not be forgotten that the small industry still exists, and that, under the convenient form of corporate capacity men still carry on industrial undertakings which are in no essential particular different from those which are carried on by copartnerships and individuals. It is this fact which makes a classification on the basis of the character of the employer inherently vicious. True, the corporation, under our laws and industrial system, has in it the seeds of tremendous growth; but, as the real evil can be reached by a classification which goes to those elements which, to some extent, have removed the reason for the co-servant rule, there is not even a color of an excuse for imposing burdens on the corporate employer, while its competitor, a natural person, who is carrying on a like business under the same conditions, is left without any such burden. If said corporations, as such, are to have legislative burdens put upon them, as by the law in controversy, then all who ought to be put in their class should be included, or, if this appears to the legislative mind as improper, owing to differences in the character of the employment, then legislation should have for its basis a classification which rests on such differences in the various employments as would make a distinction between them appear to be warranted."

There is, as we have said, nothing in any opinion which this Court has rendered which conflicts with the soundness of the proposition for which we are here contending that the Indiana statute cannot be constitution-

ally applied to the facts of this case, without depriving plaintiff in error of its property without due process of law, and denying to it the equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States. In view of the character of defendant in error's employment, the work he was doing when hurt, the reasoning of the Supreme Court of Indiana in the Bough case and of the cases cited and quoted from approvingly in that opinion, it is respectfully submitted that if this case were before that court for decision it would be bound to hold that defendant in error is not embraced by the statute and that he is not entitled to recover. And, as this Court said in *Tullis v. L. E. & W. R. Co.*, 175 U. S. on p. 353, *supra*,

"The elementary rule is that this Court accepts the interpretation of a statute of a State affixed to it by the court of last resort thereof."

But, in this case the court of another State (Kentucky) has construed the Indiana statute, and the rule just quoted does not apply to the construction the Kentucky court has given the statute.

In the light of the opinions of the Supreme Court of Indiana which we have cited it is clear that that Court would not construe the statute as embracing the case of the defendant in error. We submit that this Court must construe the statute in the light of the decisions of the Supreme Court of Indiana in order to render the statute constitutional. If this Court is of the opinion that the statute, properly construed, embraces the case of the defendant in error, then we think the Court will further declare that the statute, so construed, is violative of the "due process" and "equality" clauses of the Fourteenth Amendment to the Constitution of the United States, and the statute is, therefore, void for that reason.

In one part of the opinion of the Court of Appeals of Kentucky in this case (R. p. 143) the statement is made that it was insisted on behalf of the railroad company that the Act is unconstitutional in that it applies to corporations and does not apply to individuals whose employes may be injured. This was stating the proposition more broadly than we contended for. In the next

paragraph of the opinion, however, our contention was correctly stated by the Court; to wit,

"It is earnestly insisted that while the Act is constitutional under these rulings as to those *operating* a railroad, it cannot be held constitutional as to a carpenter; that the State may not establish a rule for carpenters in the service of a railroad, and another rule for carpenters in the service of other people."

The court then goes on to answer this objection in the following language:

"We are unable to see the force of this distinction. A railroad cannot be run without bridges; bridges cannot be built without carpenters. The work of a bridge carpenter on a railroad is perhaps no less perilous than the work of an operative on one of its trains. Coal tipples are no less essential to the operating of a railroad than bridges, because the engines cannot be operated without coal. The construction of a coal tipple is therefore essential to the operating of a railroad."

From the language quoted it will be observed that the Court of Appeals of Kentucky seemed to treat the defendant in error as a bridge carpenter engaged in the construction of a bridge at the time he was injured. This is incorrect. The defendant in error was engaged in the construction of a coal chute, or coal tipple, not on the track, but alongside of the track. The opinion in another place, shows this to be true. The point is probably not very material, because, from our point of view, if the defendant in error had been engaged in the construction or repair of a railroad bridge, there would have been no peculiar hazards incident to the work which would have justified the Legislature in providing a remedy in his behalf, when no remedy is given to any other class of carpenters or bridge builders.

But it is well to bear in mind that the work the defendant in error was doing was not even as hazardous as that of building a bridge. He was simply assisting in

the erection of a wooden structure alongside of the railroad track. He was engaged in work no more hazardous than if he had been building a similar structure for an individual. The work he was doing was not attended with any greater peril than would have been incident to the erection of a warehouse, a store, or a dwelling house for a corporation other than a railroad, or for an individual.

We think the Court of Appeals of Kentucky is clearly in error in the statement that the work of a bridge carpenter on a railroad is perhaps no less perilous than the work of an operative on one of its trains. But, if this statement is accurate, it is a stronger argument to support the view that there is no such difference between railroad employments and all other classes of employments as to justify the classification of railroads for legislative purposes than it is in favor of upholding class legislation as to all employees of railroads.

Touching this further language used in the opinion of the Kentucky Court: "Coal tipples are no less essential to the operating of a railroad than bridges, because the trains cannot be operated without coal. The construction of a coal tipple is therefore essential to the operating of a railroad." So was the coaling of engines essential to the operation of the railroad in the Akesson, Luce, Stroble and Reddington cases. So was the work of a car repairer, which Foley was doing. So was the work Malone was doing. Yet, as we have seen, the Supreme Court of Iowa, under a statute similar to the Indiana statute, held that the Iowa statute could not be constitutionally applied in those cases. The construction of a coal tipple is no more essential to the operation of a railroad than was the repairing of the railroad draw bridge in the Johnson case, nor the operation of the steam shovel in the Jemming case, and yet the Supreme Court of Minnesota, as we have seen, held that the Minnesota statute, which is similar to the Iowa statute, could not be constitutionally applied in behalf of Johnson and Jemming.

The construction of a coal tipple is no more essential to operating a railroad than is the mining of coal, or the construction or repair of railroad rolling stock, and yet Mr. Justice Brewer recognized in *Railroad Co. v. Stahley*,

62 Fed. 363, *supra*, that the Employers' Liability Act of Kansas could not be constitutionally applied to persons injured in doing any of those things, because, while they pertained to railroad work, they did so only remotely. The coal tipple defendant in error was assisting in erecting was not in use by the railroad company. It was merely in course of construction, with the ultimate purpose of being used in coaling engines. Therefore, the work did not relate directly or immediately to railroad operation in any proper sense. It was by no means as closely related to railroad operation as the rebuilding or repair of a railroad bridge on an operated railroad.

If defendant in error had been injured while doing similar work, in any of the cases last instanced, for any employer other than a railroad company, admittedly he would have had no right of recovery under the Indiana Statute. We insist, therefore, that merely because he was employed by a railroad company in doing work which was not peculiar to railroad operation, and which was not attended with extra hazard, that the statute cannot be constitutionally applied so as to afford him a remedy for injuries he received while so employed, whereas, if he had been injured while doing precisely similar work for any employer other than a railroad company, he would have been without remedy.

The opinion delivered by the Court of Appeals of Kentucky in this cause was not the unanimous opinion of that court. Two of the judges—Judges Barker and Lassing dissented. Their dissenting opinion, written by Judge Barker, was not filed until October 7, 1908, and therefore, not in time to have it made a part of the record filed in this Court, June 16, 1908. But the dissenting opinion has been made an appendix to this brief. We also transmit to this Court, with our brief, an official copy of the dissenting opinion, certified to by the Clerk of the Court of Appeals of Kentucky under his sign manual and seal of office. The Court will observe, on reading the dissenting opinion, that the Judges who concurred in it are of opinion, just as we contend in our argument, that the Indiana statute is unconstitutional when construed as the Court of Appeals of Kentucky has construed it.

THE COURT OF APPEALS OF KENTUCKY REFUSED TO GIVE
FULL FAITH AND CREDIT TO A PUBLIC ACT OF
INDIANA, IN VIOLATION OF ART. 4, SEC. 1,
CONSTITUTION OF THE UNITED STATES.

Section 1, Article 4 of the Constitution of the United States provides that, "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State."

This provision of the Constitution laid upon the courts of Kentucky the duty of giving "full faith and credit" to the "public act" of Indiana, known as the Employers' Liability Act, and under which this action was brought.

The meaning, the force and the extent of this Act have been determined by the Supreme Court of Indiana. In order to ascertain what the public act of Indiana is we must find out not merely the language of the statute, but must further ascertain what has been determined by the highest court of Indiana as to the meaning of the language used in such statute. To put an extreme case: Suppose that the defendant in error, instead of being an employe of the railroad, had been an employe of some private corporation of Indiana. The Supreme Court of Indiana under its decisions which we have cited, would hold that this public act (The Employers' Liability Act) would not apply to such a case, for the reason that that Court has held that the public act applies only to railroads and to their employes. In the supposed case, let us further suppose that the defendant in error had brought suit in Kentucky for an injury received while in the service of such private corporation in Indiana. Under these circumstances, if the courts of Kentucky were to hold that he had a right of action, they would be enforcing not a public act of Indiana, but one which was not a public act of Indiana. In other words, while the public act had been held not to be applicable to an employe of a private corporation, in Kentucky the Act would be used as if it embraced such employe. This would not be giving full faith and credit in Kentucky to the public act of Indiana, but on the contrary, would be applying the public act of Indiana to a state of case

which, according to the highest court of that State, it did not apply to at all.

The "full faith and credit" clause was designed to give to the public acts, records and judicial proceedings of one State the same force in other States as they have in the State of their origin, no more, no less. We submit therefore, that the Court of Appeals of Kentucky were bound to accept the construction of the Employers' Liability Act of Indiana, which the Supreme Court of that State had placed upon that statute, and, having failed to do so, that this Court must enforce the duty which the State of Kentucky owed in the premises, namely, to give the same faith and credit to the Employers' Liability Act of Indiana which would be given to it in that State, and not a larger, or smaller, or different credit.

While we recognize that this Court has held in a number of cases that where the case turns upon the construction by a State court of a statute of another State, and not upon the validity of such statute, a decision on that question is not necessarily of a federal character; yet the Court has also held that the question depends upon the particular facts of each case and the manner in which they are presented, how far such questions can be regarded as coming under the full faith and credit clause of the Constitution. (*Finney v. Guy*, 189 U. S. 335.)

In the case at bar, the decisions of the Supreme Court of Indiana, construing the Employers' Liability Act of that State, were proven as a fact. Those decisions, and others rendered by the same court since that time, show that the Supreme Court of Indiana has done something more than construe the statute. They have cut down the statute which the legislature enacted, in order to bring it within constitutional limits and thereby avoid the necessity of declaring the statute unconstitutional and void. Hence, it is to the decisions of that Court alone we must look in order to ascertain what the Indiana statute means. They have said that unless the statute is construed as they have held it must be construed the statute is void, because it contravenes the Fourteenth Amendment. If defendant in error had sued in Indiana instead of in Kentucky, it is clear that the Supreme Court of Indiana would have denied him a right to recover on the ground that if the statute embraced him it was unconstitutional

and void. So that, the question presented here is something substantially more than the *construction* of a statute of one State by the highest court of another State. The construction necessarily involves the validity of the statute, and the construction given the statute by the Kentucky court renders the statute unconstitutional and void under the test which has been applied to the statute, and the meaning which has been given it by the Supreme Court of Indiana.

CASES RELIED ON BY DEFENDANT IN ERROR.

We are aware of no suit brought by a railroad employe, which has been decided by the Supreme Court of Indiana since the judgments were rendered in the Lighthouse and Bough cases in which the question of the constitutionality of the statute as applied to the facts of such case has been decided. We admit our surprise that counsel for defendant in error, on page 8 of their brief, should have cited Indianapolis Street Ry. Co. v. Kane, 169 Ind.—, 80 N. E. 841, as a case *contra*. No question as to the constitutionality of the statute was made in the Kane case, until after it was decided in the Supreme Court of Indiana. Thereupon, in a petition for rehearing, the plaintiff in error attempted, for the first time, to question the constitutionality of the Employers' Liability Act as applied to the facts of that case. That court disposed of the question by holding that the attempt to raise the constitutional question for the first time in the petition for rehearing came too late. (81 N. E. 721.)

The only other case construing the statute, referred to by counsel for defendant in error as having been decided since the Bough case is B. & O. S. W. R. Co. v. Walker, 84 N. E. 730, decided by an intermediate court in Indiana—not a constitutional court, but a mere creature of the legislature—and the opinions of which court are not authoritative even in Indiana. In view of the manifest conflict between the opinion in the Walker case, and the opinion of the Supreme Court of Indiana in the Houlihan, Lighthouse and Bough and other cases we have cited, this Court will undoubtedly disregard the opinion in the Walker case.

Pittsburg, etc., R. Co. v. Ross, 169 Indiana—, 80 N. E. 845, cited on page 7 of the brief for defendant in error, while it was decided about a month later than the Bough case, it was not an authority against our contention that the Indiana statute cannot be constitutionally applied in behalf of the defendant in error in this case. Ross was a switchman, injured by the movement of cars in a switch yard. His employment was obviously extra-hazardous. From the very brief statement in the opinion in that case with respect to the constitutional question, it must be assumed, in view of the character of Ross' employment that the constitutional question which the Court refused to consider, was not the question we present to this Court, but was one challenging the constitutionality of the statute *in toto*. We concede that Ross was within the statute as it can be constitutionally applied. The work of a railroad switchman is one involving peculiar railroad hazards. The work of a carpenter for a railroad company involves no hazards that are peculiar to the operation of railroads. Such work is just as hazardous when done for an individual or a corporation other than a railroad, as it is when done for a railroad.

St. Louis M. B. T. R. Co. v. Callahan, 194 U. S. 628, cited on page 7 of the brief for defendant in error, is not an authority in this case for at least two reasons:

(1). The question here is not how the Missouri Court of last resort construed the Missouri Employers' Liability Statute, and in which construction this Court acquiesced in the Callahan case, but how the Supreme Court of Indiana would construe the Indiana statute if the case at bar were before that court for decision.

(2) There was a sudden emergency in the Callahan case, and the work then being done was of a peculiarly hazardous character. Even though it did not relate directly to the operation of railroad trains, it did do so very closely.

In the case at bar there was no sudden emergency. The work was not being hurried to completion. There was nothing out of the ordinary either as to the character of the work, or as to the manner in which it was being prosecuted. If it can be said that the work related to

railroad operation at all, it did so only very remotely, secondarily and incidentally.

We will briefly comment on the cases cited on pages 10 and 11 of the brief for defendant in error, and which we have not already noticed.

In the Schoolcraft case, a person not in the employment of a railroad company was killed by being struck by a car through the negligence of the railroad employes. He lost his life as a result of negligent railroad *operation*.

In *Pierce v. Van Dusen*, a railroad yard brakeman, while engaged in switching cars, was injured through the negligence of his conductor. The brakeman was admittedly engaged in an extra-hazardous business.

In *Kane v. Erie R. Co.*, a railroad fireman was killed while on duty, in a collision occasioned by the negligence of the engineer of another train. Kane's vocation was extra-hazardous.

In *Railroad Company v. Carlin*, while the injured employe was a bridge hand, he was injured as a result of railroad operation. The bridge was being repaired while trains were using it. A train approached at great speed, and while crossing the bridge struck a spike maul or heavy iron hammer which had negligently been left on the bridge track by the bridge foreman, and which hammer was thrown against Carlin. The court held that the effect of the Texas Employer's Liability Act was to make the foreman a vice principal as to Carlin and not his fellow-servant. That case was before this Court in 189 U. S. 354. There is nothing to show that the constitutionality of the Texas statute, when put to the test of the Fourteenth Amendment, was challenged. This Court affirmed the judgment of the Circuit Court of Appeals for the Fifth Circuit. In view of the circumstances of that case, the decision might well have been rested on the proposition that it arose out of railroad *operation*.

In *Edge v. Electric Ry. Co.*, a motorman was injured in a collision between his car and another car, due to the negligence of the car dispatcher. Edge was manifestly engaged in railroad operation.

In *Railroad v. Miller*, a brakeman was injured while under a disabled engine, out on the road,—was injured in train operation.

In *Hancock v. Railroad Co.*, a section hand was in-

jured by reason of the hand-car on which he was riding running into an open switch, negligently so left by a train brakeman. Hancock's case came fairly within train operation.

In *Railroad Co. v. Mohrmann*, while the employe injured was not on a train he was injured by the negligence of a train brakeman.

It must be admitted that the disposition of the Texas, Georgia and North Carolina courts has been to give the employers' liability statutes of those States a more latitudinarian interpretation, as to the character of the employes held to be embraced by said statutes, than has been given to similar statutes by the Iowa, Minnesota, Kansas and Indiana Supreme courts. This is apparent from a reading of the other cases cited by opposing counsel. Still this does not affect our case. Learned counsel for defendant in error overlook or ignore the decisions of the Iowa, Minnesota, Kansas and Indiana courts, and also the fact that the Supreme Court of Indiana has expressly interpreted the Indiana statute as the Iowa, Minnesota and Kansas courts have interpreted the statutes of those States, and evidently disagreed with the Texas, Georgia and North Carolina courts, as no mention is made of any opinions of those courts in the Bough opinion. We think the Iowa, Minnesota, Kansas and Indiana courts are right, and that the Texas, Georgia and North Carolina courts are wrong. But this is immaterial in this case. The question is, not how the courts of the last named States construe the Employers' Liability statutes of those States, but is, how would the Indiana Supreme Court construe the statute of that State involved in this case, if it were before that court? Would it so construe the statute as to hold that defendant in error was embraced by its terms? We think we have made it clear that it would not.

As this Court said in *Lochner v. New York*, 198 U. S. on page 53, there are "certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public.

Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State in the exercise of those powers, and with such conditions the Fourteenth Amendment was not designed to interfere."

The opinion then discussed the decisions of the Court upholding statutes enacted by State legislatures under the police powers, but declared that there was no reasonable ground, on the score of health, for the legislature of New York to interfere with the hours of labor of a baker; that "the limit of the police power has been reached and passed in this case." That no law limiting such hours could be justified as a health law to safeguard the public health or the health of the individuals following that occupation; that the statute which forbade bakers working more than sixty hours a week, or ten hours a day, was not a legitimate exercise of the police power of the State, but was an unreasonable, unnecessary and arbitrary interference with the right and liberty of the individual to contract, and as such was in conflict with, and void under, the Fourteenth Amendment to the Constitution. While that case involved the question of the right of a State legislature to deny a person his liberty of contract guaranteed by the Fourteenth Amendment, and the case at bar involves the question of the right of a State legislature to take the property of a railroad company to satisfy the claims of its employees who are injured, and when no other classes of like employees injured under like circumstances would be entitled to compensation, still the principle is the same, and the reasoning of the Court in the *Lochner* case is very apposite here. The legislature of Indiana had no more right, if it has attempted to do so, to provide by statute for a right of recovery on behalf of a carpenter who works for a railroad, when the legislature has provided no such right on behalf of a carpenter working for individuals, or for any other class of employer except railroads, than the New York legislature had the right, in the statute which this Court declared unconstitutional in the *Lochner* case, to forbid the owner of a bakery, or his employees, from contracting for the employees working a greater number of hours in the week or day than those fixed by statute.

We ask the Court in connection with this brief to

read what was said in plaintiff in error's petition for rehearing in the Court of Appeals of Kentucky, (R. pp. 147 to 161) and in its motion for an oral argument on said petition (R. pp. 161 to 163.) Inasmuch as plaintiff in error is not a corporation of the State of Indiana, but of Kentucky, (R. p. 2) the reasoning in *Railroad Co. v. Paul*, 173 U. S. 404, is inapplicable here.

Wherefore the plaintiff in error prays that the motion of the defendant in error to dismiss and affirm be denied; and that the case be passed until it is regularly reached on the docket of this Court for oral argument. Unless the Court, after reading the briefs on behalf of and in opposition to the motion to dismiss and affirm, shall feel that no further arguments, orally or by brief, are needed, in which event we are willing that the Court shall, on the record, and on the briefs filed, consider the case on its merits and decide it at this time, and without further argument.

In the event the Court shall take such course, the plaintiff in error prays that the judgment of the Court of Appeals of Kentucky may be reversed by this Honorable Court, and this cause remanded to said Court of Appeals of Kentucky, with directions to send down its mandate to the Circuit Court of Hopkins County, Kentucky, directing it to dismiss defendant in error's petition.

Respectfully submitted,

BENJAMIN D. WARFIELD,
Counsel for Plaintiff in Error.

HENRY LANE STONE,
CLIFTON J. WADDILL,
Of Counsel.

October 17, 1908.

APPENDIX.

COURT OF APPEALS OF KENTUCKY.

October 7, 1908. To be reported.

LOUISVILLE & NASHVILLE RAILROAD COMPANY.....*Appellee.*

vs.

SPENCER MELTON, -----*Appellee.*

APPEAL FROM HOPKINS CIRCUIT COURT.

DISSENTING OPINION OF JUDGE BARKER.

I find myself unable to concur in the opinion affirming the judgment in this case, and the duty I owe myself, as well as that due the appellant, constrains me, much against my natural inclination, to state the reasons for dissenting from the conclusion reached by a majority of my brethren.

On March 2, 1905, a carpenter's force of the Louisville & Nashville Railroad Company were constructing coal chutes near, but not upon, the tracks or roadway of the railroad company, at the mines of the Ingle Coal Company, at or near Howell, Indiana. The force consisted of seven laborers, including the foreman, one W. C. Shrode, and appellee Melton. In raising, with an ordinary pulley, block and tackle, a bent of timber weighing about one thousand pounds from a partly horizontal to an upright position, the bent fell by reason of a latent defect in the welding of one of the links of a chain, with which one of the pulley blocks was temporarily attached

to the frame work. In falling the bent fell upon Melton and produced a concussion of his spine, resulting in partial paralysis of his lower extremities. For this injury Melton brought his action against the railroad company in the Hopkins Circuit Court, and elected to proceed under the statute of the State of Indiana, commonly known as the "Employers Liability Act." A trial of the action resulted in a verdict for compensatory damages in the sum of twenty-two thousand dollars.

As Melton's cause of action is rested upon the Indiana statute regulating the liability of corporations for injuries received by their employes, the first question with which we are confronted is, whether or not that act, as construed by the majority opinion is constitutional, or whether, on the contrary, it is inimical to that provision in the Fourteenth Amendment of the Federal Constitution, which guarantees to all the equal protection of the law, or, as has been said, the protection of equal laws. As the act in question is fully set out in the opinion of the court, it is not necessary to incorporate any part of it here. It is deemed sufficient to say that it prescribes a different rule of liability for those employers who may be brought within its purview from that imposed by the laws of Indiana upon other employers for injuries occurring to their employes, and unless it can be differentiated by a reasonable classification from those laws, it must be held violative of the Federal Constitution.

It is earnestly contended by counsel for appellant, that the Indiana court of last resort has construed this act to be applicable only to those employers operating railroads; and further, that it has limited its application to injuries occurring to employes engaged in the hazard of the actual operation of the railroad at the time they were hurt. Whether this be so or not, I shall not now investigate. This Court has enforced the act as applying to injuries occurring to all railroad employes, whether they be at the time engaged in the active operation of the railroad as such, or whether they are engaged in what may be termed collateral occupations, among which may be included all those occupations which are merely auxiliary to the active operation of the railroad and not subject to the extreme hazard which exists in the active

carrying forward of its operation. This conclusion makes it necessary to inquire whether the act, as construed, is or is not inimical to the equality clause of the Federal Constitution.

As said before it is not permissible, under the Federal Constitution, to impose arbitrarily upon one class burdens which are not imposed upon the community in general; nor may a legislature arbitrarily impose a liability upon one class of employers which is not imposed upon others. Undoubtedly, the State may regulate the liability of employers to their employes if the classification for regulation be based upon just and reasonable principles; but it may not arbitrarily select one class whose liability is to be ascertained by rules more stringent than apply to employers generally doing a similar business.

This principle has nowhere been more clearly and forcibly expressed than by the Supreme Court of the United States in *G. C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, where the question we have in hand is discussed. In the opinion, it is said:

"But it is said that it is not within the scope of the Fourteenth Amendment to withhold from States the power of classification, and that if the law deals alike with all of a certain class, it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true (citing many cases), yet it is equally true that such classification can not be made arbitrarily. The State may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such bases. . . . "But arbitrarily selection can never be justified by calling it classification. The equal protection demanded by the

Fourteenth Amendment forbids this. No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews, speaking for this court, in *Yick Wo v. Hopkins*, 118 U. S., 356, 369: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not leave room for the play and action of purely personal and arbitrary power.' The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty, and the pursuit of happiness.' While such declaration of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. . . . "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification— and is not a mere arbitrary selection. Tested by these principles, the statute in controversy can not be sustained."

Upon the same subject, the Supreme Court, in *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, said:

"The difficulty is not met by saying that, generally speaking, the State when enacting laws may, in its dis-

cretion, make a classification of persons, firms, corporations and associations, in order to subserve public objects. For this Court has held that classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. . . . But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. . . . It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.' ”

To the same effect are *Cotting v. Kansas City Stock Yards Company, etc.*, 183 U. S., 79, and *Ballard v. Mississippi Cotton Oil Company*, 81 Miss., 507, 62 L. R. A., 407; *Cooley on Constitutional Limitations*, 7th edition, pp. 560-563.

In view of the foregoing authority, the question recurs: Does the statute under discussion, as construed in this case, afford a reasonable or just classification when it establishes one rule of liability for injuries occurring to all railroad employes without regard to whether they are engaged in the hazard of railroad operation, leaving the liability of all other employes subject to a less stringent rule of liability? It is a matter of common knowledge that only a small per cent of a railroad corporation's employes are engaged in its active operation. Outside of the men operating the railroad, there is a very large class of employes who are engaged in mere clerical work, and who have no more to do with the actual operation of the railroad as such, than the clerks and book-keepers of any mercantile establishment. Railroads employ many lawyers, surgeons, and clerks; some of them keep large forces of men engaged in cutting cross-ties in the forests, or in the breaking of stone

for ballast, and in mining coal for the use of the engines. All are engaged in precisely similar business to that carried forward by other employers who are confessedly not within the purview of the act. The appellee, himself, at the time he was hurt was engaged as a carpenter in building a coal chute or tippie at the Ingle Coal Mines, near or on the railroad's right of way. It does not appear whether this chute was for the benefit of the railroad or the mining corporation; but I shall assume, in order to eliminate any question of fact, that the chute was being constructed for the purpose of coaling the railroad's engines. Now, let us suppose that the coal company had had a force of carpenters building coal chutes by the side of those being built by appellee, for the purpose of putting its coal on the cars for shipment, and that a similar accident had happened at the same time to one of its employes; the employe of the coal mining corporation, if he had sued, would have been forced to ground his action upon the common law prevailing in Indiana, while if the majority opinion be sound, appellee could maintain his action under the statute. Assuming for the purpose of the argument, that the two accidents were caused by identically the same mishap, we would have different rules regulating the remedy of the injured persons, although the occupation of each was precisely the same. Such illustrations could be multiplied indefinitely; but they would throw no additional light upon the discussion. The appellee, in building the chute by the side of the railroad, was subject to no more hazard than would have been the employes of the coal company, had they been engaged in building chutes for their employer. It seems to me utterly fallacious to say that the statute when made to apply to the cases of those employes who are hurt in collateral occupations, does not prescribe an arbitrary rule of liability for railroad corporations for injuries to their employes, from which other employers doing identically the same business are exempt.

The view I have expressed above is supported by very high authority. In the case of *Kline v. Minnesota Iron Co.*, 93 Minn., 63, 66, the Supreme Court of Minnesota, in construing a statute of that State identical in principle with the one under discussion, said:

"This statute has been before the court in numerous cases, and we have uniformly held that it was intended by the Legislature to apply to 'railroad hazards', and not to railroads as such; that the character of the employment was the test to be applied in determining its validity and not the character of the employer. It was first construed in *Lavallee v. St. Paul, etc. R. Co.*, 40 Minn., 249, 41 N. W., 974, where it was held that, if the statute be held to apply to railroad corporations, as such, it would be invalid and unconstitutional as class legislation, for it is beyond the power of the legislature to single out a particular class of employers, and impose upon them a distinct rule of liability for personal injuries; but, if construed to apply to the character of the employment, the legislation was valid. It was accordingly held in that case that the Legislature intended that it should apply to the hazards and dangers peculiar to the use and operations of railroads, and the decision there made has been followed in all subsequent cases."

In the case of *Deppe v. Chicago, etc., R. Co.*, 36 Ia., 52, 55:

"But if the statute be so construed as to apply to all persons in the employ of railroad corporations without regard to the business they were employed in, then it would be a clear case of class legislation, and would not apply upon the same terms to all in the same situation, and hence would be unconstitutional, and manifestly so. To illustrate, suppose a railroad company employ several persons to cut the timber on its right of way where it is about to extend its road, and the land owner employs a like number of persons to cut the timber on a strip of equal length alongside such right of way. If one of each set of employes shall be injured by the negligence of a co-employee, and the employee of the railroad company can, under the statute, maintain an action against his employer and the other can not, then it is clear that the law does not apply upon the same terms to all in the same situation. The law, then, would not have uniform operation, but would be violative of the Constitution just as much as a law that should prescribe under the same circumstances different liabilities for

merchants, for mechanics and for laborers. The manifest purpose of the statute was to give its benefits to employes engaged in the hazardous business of operating railroads. When thus limited it is constitutional; when extended further it becomes unconstitutional."

To the same effect ^{are} ~~the~~ *Jemming v. G. N. R. Co.*, 104 N. W., 1079; *R. Co. v. Pontius*, 52 Kan. 264; *Johnson v. St. Paul & Duluth, R. Co.*, 8 L. R. A. 419; *Lavallee v. St. P. M. & M. R. Co.*, 40 Minn., 249; *Ballard v. Mississippi Cotton Oil Co.*, 81 Miss. 507.

I can not agree to the assumption that the Supreme Court of the United States, in *Tullis v. Lake Erie & Western Railroad*, 175 U. S. 348, upheld the constitutionality of the act in question as construed in the opinion. An examination of the opinion in the case of *The Bedford Quarries Co. v. Bough*, 80 N. E., 529, and the various opinions reviewed therein, will show that the Supreme Court of Indiana limited the application of the statute to the injuries of railroad employes engaged in the hazard of the active operation of the road; and it was this construction that was upheld by the Supreme Court in the case referred to above.

The opinion of the Supreme Court of the United States and that of the Supreme Court of Indiana show that these Courts both held that the Indiana statute, as construed by the latter court, was practically the same as the statutes of Kansas and Iowa, as construed by the Supreme Courts of those States; these statutes were construed without doubt to apply only to the hazard of railroading, and it was expressly said if they had been intended to apply to all employes of railroads they would be violative of the Federal Constitution. *Deppe v. Chicago, etc. R. Co.*, *supra*; *Akeson v. Chicago, etc. R. Co.*, 106 Ia., 54, 56; *Railroad Co. v. Pontius*, 52 Kansas 264; *Railway Co., v. Mackey*, 127 U. S. 205.

To show that the Supreme Court of Indiana was of opinion that the statute under discussion, as construed by it and sustained by the Supreme Court of the United States, is identical with the statutes of Kansas and Iowa, as construed by the Supreme Courts of those States, I copy the following excerpt from the opinion in *Bedford Quarries Co. v. Bough*, *supra*:

"The Employers' Liability Act of Kansas was the same as the Iowa act above set out. (*Mo. Pac. R. Co. v. Haley, Admr.*, 25 Kan. 35, 53), and the Supreme Court of that State, following the construction given by the Iowa Supreme Court, held in 25 Kan., *supra*, p. 53, that it 'embraced only those persons exposed to the hazards of the business of railroading.' *Missouri, etc. R. Co. v. Medaris*, 60 Kansas, 151, 154, 155; *Mo. Pac. R. Co. v. Mackey*, 33 Kan., 298, 302.

"It was held, in effect, by this Court in *Pittsburg, etc. R. Co. v. Montgomery*, 152 Ind. 1, 8-14, that the Employers' Liability Act of this State was capable of severance, by putting railroads in a class by themselves, and that such classification was proper on account of the dangerous and hazardous business of the operation of railroads, and that so construed, said act, as applied to railroads, was not in violation of either said Section 23 of Article 1 of the Constitution of this State, or of the Fourteenth Amendment of the Constitution of the United States, even if unconstitutional as to the other employers and employes mentioned.

"In *Tullis v. Lake Erie, etc., R. Co.*, 175 U. S. 348, it was held that this Court in the *Montgomery* case treated the Employers' Liability Act as practically the same as said statutes of Iowa and Kansas, and that so construed, it did not arbitrarily classify railroads by name, but with regard to the business in which they were engaged, which was a proper classification on account of the dangerous and hazardous business of operating railroads, citing *Mo. Pac. R. Co. v. Mackey*, 127 U. S. 205; *Minneapolis, etc., R. Co. v. Herrick*, 127 U. S., 210, which sustained the constitutional validity of a like statute.

"In *Pittsburg, etc., R. Co. v. Lichteiser*, 168 Ind., 438, 78 N. E., 1033, 1041, 1043, this court approved the *Montgomery* case, gave the Employers' Liability Act, as applied to railroads, practically the same construction as had been given to the statutes of Iowa and Kansas on that subject, and held that putting railroads in a class by themselves was proper classification on account of the dangerous and hazardous business of operating railroads, and that such classification is not based upon the

difference in employers but upon the difference in the nature of the employment."

Nor can I agree to the statement in the opinion, that Melton was engaged in the hazard of the operation of the railroad, because he was building a coal chute and coal is necessary to the operation of a railroad. The chute was entirely separated from the railroad's right of way, and the carpenters who were building it were in no danger from anything done in its operation. Railroads, in order to be operated, must have crossties and ballast, they must have clerks, bookkeepers and auditors to keep their accounts, lawyers to defend their suits and telegraphers to dispatch their trains; but none of the men employed in these occupations can be said to be engaged in the hazard of the operation of the railroad.

Believing that the statute under which this suit was brought violates the equality clause of the Federal Constitution, and is, therefore, void, I can not concur in the opinion of the court.

I am authorized to say that Judge Lassing concurs in this dissent.

BENJAMIN D. WARFIELD,
WADDILL & DEMPSEY,
for appellant.

CLAY & CLAY,
GORDON, GORDON & COX,
for appellees.

THE COMMONWEALTH OF KENTUCKY.

THE COURT OF APPEALS, SEC.

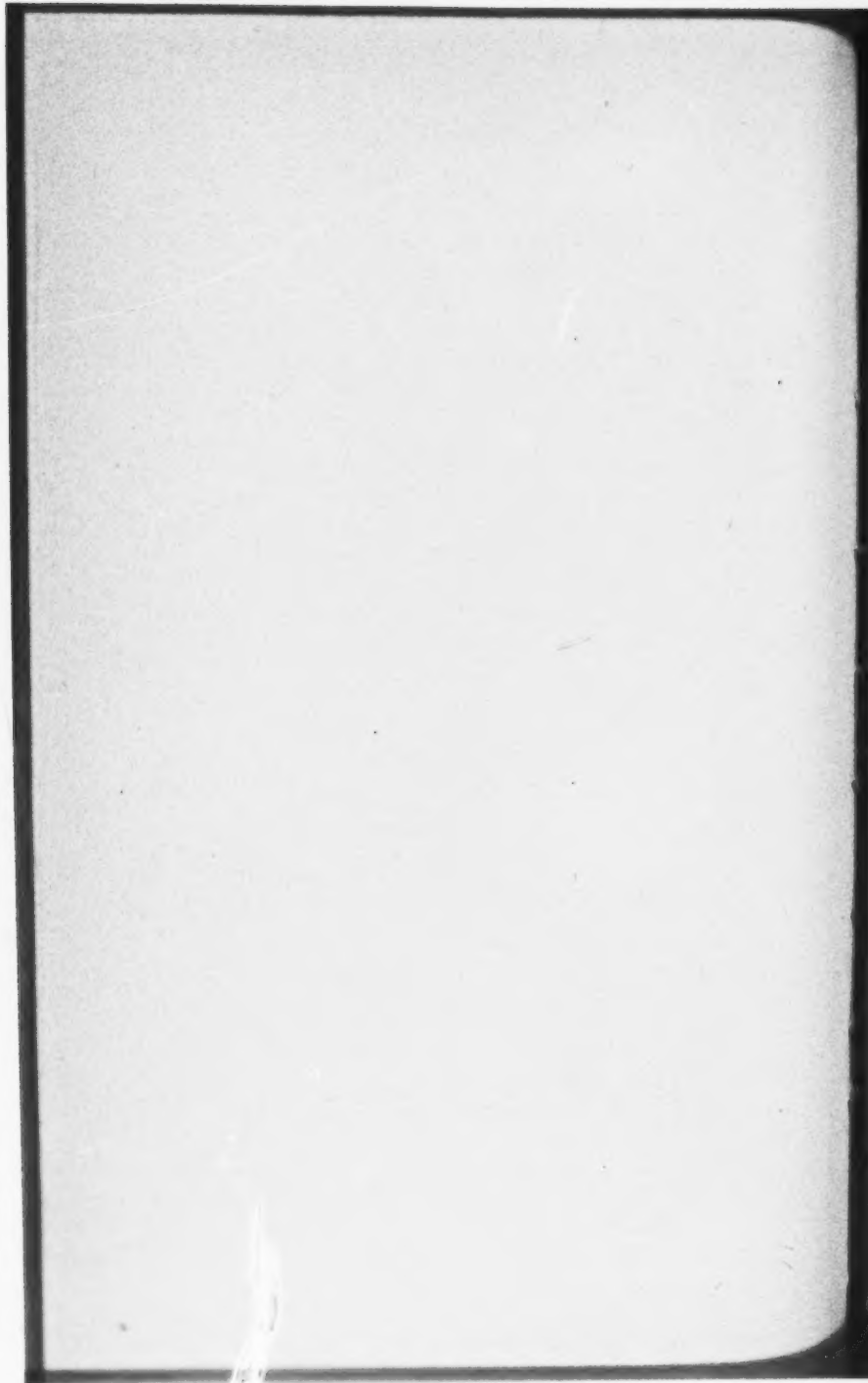
I, Napier Adams, Clerk of the Court of Appeals of Kentucky, certify that the foregoing is a true and correct copy of the dissenting opinion delivered by Judge Barker and concurred in by Judge Lassing, in the case of The Louisville & Nashville Railroad Company vs. Spencer Melton on the appeal from the Hopkins circuit court, as the same appears from the records and files of my office.

In Testimony Whereof, I, Napier Adams, Clerk of the Court aforesaid, have hereunto subscribed my name and affixed the seal of this Court.

NAPIER ADAMS,
Clerk Court of Appeals of Kentucky.

(SEAL)





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JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States

OCTOBER TERM 1909. No. 180.

Louisville & Nashville Railroad Company - Plaintiff in Error

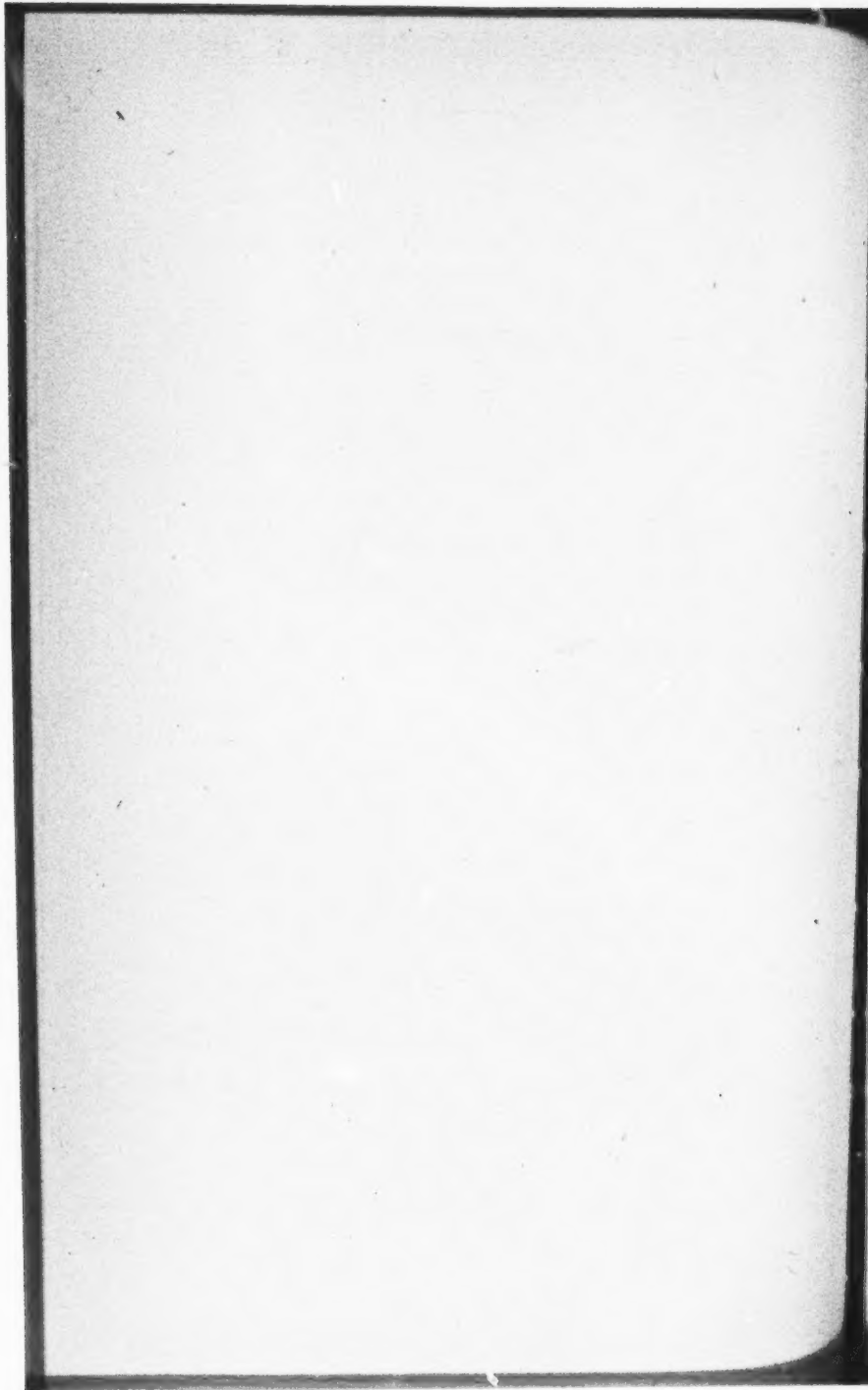
VS.

Spencer Melton - - - - - Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

BENJAMIN D. WARFIELD,
Counsel for Plaintiff in Error.

HENRY LANE STONE,
Of Counsel.



Supreme Court of the United States.

LOUISVILLE & NASHVILLE RAILROAD
COMPANY *Plaintiff in Error,*

vs.

SPENCER MELTON *Defendant in Error.*

REPLY BRIEF FOR PLAINTIFF IN ERROR.

I.

Counsel for defendant in error, in the brief they have filed, speak of defendant in error as having been "a member of a construction crew." They probably feel that such a characterization of Melton's employment, makes it sound more hazardous than to call him a carpenter. But he calls himself a carpenter, and the Court of Appeals of Kentucky calls him a carpenter. Melton testified in chief: "Q. What were you employed to do? A. Carpenter's work. * * * Q. You were employed to do general carpenter's work you say? A. Yes, sir, just hired as a laboring man in the capacity of carpenter's work." (Printed Record, p. 36.) And the first line of the opinion of the Court of Appeals of Kentucky says: "Spencer Melton was a carpenter in the service of the Louisville & Nashville Railroad Company," etc. (Rec. p. 142; 127 Ky. on p. 283). This is shown, also, by the quotation from opinion on page 4 of the brief on the other side. There can be no question that Melton was merely a carpenter and was doing the

ordinary work of a carpenter when he was hurt.

Again, emphasis seems to be laid by opposing counsel on the fact that the Court of Appeals of Kentucky says that Melton was "engaged in building a coal chute *on* the railroad tracks near Howell." In the very nature of things, the coal chute could not have been built *on* the railroad tracks, and it is very evident that the Kentucky court merely meant that the chute was in course of construction *alongside of* the railroad tracks. It is stated in the dissenting opinion of that court (127 Ky., on p. 298) that it does not appear whether the chute was for the benefit of the railroad company or the mining corporation, but, in order to eliminate any question of fact, the dissenting opinion assumed that the chute was being constructed for the purpose of coaling the railroad's engines.

In the "brief of defendant in error on his motion to dismiss and affirm," which is on file in this court, it is stated (p. 4): "The claim that the Act, as applied to this case violates the Federal Constitution is directly raised by the pleadings in the case, and is directly passed upon by the Court of Appeals of Kentucky, and the constitutionality of the Act is upheld. It is therefore admitted that this court has jurisdiction of the case." And in the brief on this hearing, filed by counsel for defendant in error, it is conceded that plaintiff in error relied on Section 1, of Article Fourteen, of the Amendments to the Constitution of the United States in its pleadings, and that the Court of Appeals of Kentucky passed adversely on this contention in its opinion. Nevertheless, the attempt is now made by counsel for defendant in error, to "whittle away" the Federal question, by the argument that plaintiff in error only relied on the "equal protection" clause of section 1 of said

Amendment, and did not rely on the "due process" clause.

When defendant in error pleaded the Indiana statute as the basis of his action (R. p. 7), plaintiff in error filed answer thereto (R. p. 11), denying that any part of the statute pleaded applied to plaintiff's cause of action; and then, by further amended answer (R. p. 15), plaintiff in error alleged that except as constitutionally modified by the statute pleaded in the amended petition the common law of Indiana is and has always been that all employes of a common master are fellow servants, for whose negligence the master is not responsible, except as alleged in the answer; and further alleged that the Indiana statute pleaded "cannot and does not apply to the facts in this case and plaintiff cannot rely thereon, and that under the law of Indiana as to the character of work then in hand the plaintiff was a fellow-servant with the said foreman of the construction crew for whose negligence the defendant is not liable." Then, by additional amended answer (R. p. 20), plaintiff in error pleaded "that the Indiana statute pleaded in the amended petition herein cannot constitutionally apply to the facts in this case; that under the laws of the State of Indiana in force at the date of the injuries to plaintiff and at the date of the enactment of said statute there was no liability whatever on the master under the facts unless the terms of said statute are made to apply; that the Constitution of Indiana at the date of said enactment and at the time of the injury provided that the laws of that State should be uniform and equal and should not in any way discriminate against any person or corporation; that section 1, article 14, of the Constitution of the United States provides that no State shall deny to any person within its jurisdiction the equal protection of the laws. * * * Defendant says

that in so far as the terms of said Indiana statute are made to apply to the facts of this case they are unconstitutional and void; that they are violative of the Constitution of Indiana and are violative of said provision of the United States Constitution. Defendant distinctly raises the federal question that the said statute in so far as made to apply to the facts of this case is violative of said provision of the Constitution of the United States and void." Then, in its motion and grounds for new trial in the Hopkins Circuit Court, plaintiff in error alleged as one of the grounds of error (R. p. 26): "The court erred in upholding and applying the Indiana statute pleaded in this case when same so far as applicable to the facts proven in this case is unconstitutional and void. It is discriminatory against defendant and denies it the equal protection of the law. It is violative of the Constitution of the State of Indiana and of section 1, of article 14, of the Constitution of the United States, which guarantees to defendant the equal protection of the law." Then, in its bill of exceptions, plaintiff in error, among other things, recited error committed by the trial court in the following respects: (R.p.28) "2. The Indiana statute upon which this action is based does not apply to the facts proven. 3. In so far as the terms of the Indiana statute apply to the facts proven they are unconstitutional and void. They are discriminatory against defendant and deny it the equal protection of the law. They are violative of the Constitution of Indiana and of section 1, article 14, of the Constitution of the United States, being section 1 of the fourteenth amendment thereto." Then, on motion for peremptory instruction at the close of all the evidence, the Federal question was again raised (R. p. 139). So much for the manner in which plaintiff in error raised the Federal question in the trial court. As to the manner in which the ques-

tion was presented and considered in the Court of Appeals of Kentucky, see pages 143, 144, 147 to 163, inclusive, 173 and 174 of the Record.

The question passed on by the Court of Appeals of Kentucky, as shown by its opinion, is thus stated therein (Rec. pp. 143, 4; 127 Ky., on pp. 285, 6):

"It is insisted for the railroad company that the act is unconstitutional in this: that it applies to corporations and does not apply to individuals whose employes may be injured. The Supreme Court of Indiana has construed the statute only to apply to railroad companies. It is held that it applies to all persons, whether natural or artificial, operating a railroad, and that it does not apply to any other business. * * * It is earnestly insisted that, while the act is constitutional under these rulings as to those operating a railroad, it cannot be held constitutional as to a carpenter; that the State may not establish a rule for carpenters in the service of a railroad, and another rule for carpenters in the service of other people." * *

And, in the response to the petition for rehearing, the Kentucky court said (Rec. p. 173): "We are unable to see that the Indiana statute as construed in the opinion, is in violation of the fourteenth amendment to the Constitution of the United States, or that any right guaranteed thereby is denied by the decision in this case. We endeavored to show this in the original opinion. We are also unable to see that the conclusion we reached is not in keeping with the construction of the statute by the Supreme Court of Indiana."

Now the language we have quoted from the opinion and response to the petition for rehearing, both show that the Court of Appeals of Kentucky treated the Federal question raised in the case to be as broad as the whole of Section 1 of Art. 14, Amendments to Const.

U. S.; that the court, in deciding the case, considered all of the Indiana cases, which are relied on by plaintiff in error in this case, except the Kinney case which had not then been decided; and that the Kentucky court reached the conclusion, under all of the Indiana cases, except the Kinney case, that Melton was not excluded from the operation of the statute as that statute was constructed in all of the cases so relied on and discussed in the original briefs, in the petition for rehearing and in the oral arguments on such petition. Both the opinion and the dissenting opinion of the Kentucky court show this to be true. And it is also true that neither in their brief on original hearing, in their printed response to petition for rehearing, or in their oral argument on said petition, did opposing counsel make any claim that all of the Indiana decisions referred to in the arguments, briefs, petition for rehearing and response thereto, and in both the opinion and dissenting opinion of the court, were not proper to be considered as they were in fact considered by the court below, whether decided before or after the Melton case arose and was tried at *nisi prius*, and whether expressly pleaded and proven or not. Therefore, it is too late in the day for opposing counsel to make the claim that the only Indiana cases this court can consider on this writ of error are the Harrell, Foreman and Peterson cases, which were put into the record in the trial court. We insist that this court can and will consider any Indiana case, construing and fixing the limits of the Indiana statute, which the Court of Appeals of Kentucky expressly considered, and which includes the Lightheiser, Houlihan and Bough cases, cited and discussed in our original brief (p. 36 et seq.), the latter of which is quoted from in the dissenting opinion, with citation of authorities.

Furthermore, counsel for defendant in error treated the Indiana cases, except the Kinney case, as part of the record not only in their printed and oral arguments in the Court of Appeals of Kentucky, but in their brief on motion to dismiss and affirm in this court (See pages 5 to 10, inclusive, of the latter argument.)

On this proposition we invite the Court's attention to the following opinions of this Court:

In *Land & Water Co. v. San Jose Ranch Co.*, 189 U. S., on p. 179 the Court said:

"Motion is made to dismiss this writ of error upon the ground that no Federal right, title, privilege or immunity was 'specially set up or claimed' by the plaintiff in error, as required by the third clause of Rev. Stat., sec. 709. None such appears in the complaint, although we think it sufficiently appears in the motion for a new trial, and in the assignments of error in the state Supreme Court. It also appears from the opinion of the court that plaintiff relied upon the act of Congress of March 3, 1887, for the readjustment of land grants, 24 Stat. 556, and the question considered by the court, and upon which the case turned, was whether the plaintiff had brought itself within the scope of the act. This question was fully considered by the court, and it was held that the defendant, having acquired its rights prior to the act of 1887, must prevail against the right claimed by the plaintiff.

"While the right under the act of 1887, thus considered, was not originally set up and claimed by the plaintiff, inasmuch as it was not an original right, but a right available in rebuttal of the defense, it is one which appears to have been insisted upon in the argument; and under the rule of this court, requiring the opinions to be sent up with the record, it has been frequently held to be a sufficient compliance with the words 'specially set up and claimed,' that it was fully considered in the opinion of the court and ruled against the plaintiff in error. *Murdock v. Memphis*, 20 Wall. 590,

633; *Gross v. United States Mortgage Co.*, 108 U. S. 477; *Philadelphia Fire Association v. New York*, 119 U. S. 110, 115; *Egan v. Hart*, 165 U. S. 188; *Sayward v. Denny*, 158 U. S. 180, 184; *Mallett v. North Carolina*, 181 U. S. 589. These must be considered as leading, under our change of rule, to a different result from that reached in some prior cases, *Williams v. Norris*, 12 Wheat. 117; *Rector v. Ashley*, 6 Wall. 142, and *Gibson v. Chouteau*, 8 Wall. 314, in which we held that the opinion of the state court could not be resorted to for the purpose of showing that a question of Federal cognizance was decided."

Sec. 709 R. S., referred to in the foregoing opinion reads as follows: (4 Federal Statutes, Annotated, pp. 467, 8).

"A final judgment or decree in any suit in the highest court of a State, in which a decision of the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States:

"The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, at

their discretion, award execution, or remand the same to the court from which it was removed by the writ."

The judgment which this writ of error was issued to review was the final judgment of the highest court of the State. There was drawn in question in said action the validity of the Employers' Liability Act of Indiana, as applied to the claim of the defendant in error herein by the court of last resort of Kentucky, on the ground that as so applied the decision was repugnant to the Constitution of the United States; and the decision of said court having been in favor of the validity of the statute as that court applied it. Therefore, this writ of error must have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States.

In *Bank of Commerce v. Tennessee*, 163 U. S. 416, this Court held that the opinion of the Supreme Court of the State, where a part of the record, gives this Court the right to look into the opinion for the purpose of discovering the ground on which the judgment of the court actually proceeded. In that case the Court held that where the opinion was in favor of the party who claims the right or immunity under the Federal Constitution, and the judgment as rendered actually denied such right or immunity, a Federal question was involved which gave this Court jurisdiction.

For other cases holding that the opinion of the Supreme Court of a State is to be treated as a part of the record on writ of error from this Court, see *Andrews v. E. O. Land Co.* 203 U. S. 129; *Egan v. Hart* 165 U. S. 188.

And in *Burt v. Smith*, 203 U. S. on pp. 134, 5, this Court said: "No doubt an opinion may be resorted to for the purpose of showing that a court actually dealt with a question presented by the record, or that a right

asserted in general terms was maintained and dealt with on Federal grounds. *Missouri, Kansas & Texas Ry. Co. v. Elliott*, 184 U. S. 530, 534; *San Jose Land & Water Co. v. San Jose Ranch Co.*, 189 U. S. 177, 179, 180; *German Savings & Loan Society v. Dormitzer*, 192 U. S. 125."

We therefore contend that inasmuch as the Court of Appeals of Kentucky, and without any objection from counsel for defendant in error, considered all of the Indiana cases on which we rely except the *Kinney* case (not then decided), as the opinion shows, and inasmuch as this Court will treat the opinion of that court as a part of the record on this writ of error, that this court will look to the Indiana opinions in order to determine whether or not the judgment of the Kentucky court holding that defendant in error comes within the operation of the statute of Indiana sued and relied on, as it can be constitutionally applied, denies full faith and credit to the Indiana statute as construed by the highest court of that State; deprives plaintiff in error of its property without due process of law; or denies to it the equal protection of the laws.

II.

The brief on the other side refers to sections 1624, 1635 and 2419 Ky. Stats., and quotes section 1635, which provides how records and judicial proceedings of another State can be proven in Kentucky, in an effort to show that the only Indiana cases the Kentucky Court was required to consider were those proven in the trial court. But the sections referred to do not sustain the contention. Furthermore, this Court will observe that section 1641 Ky. Stats., only makes provision for proving the common law of another State; section 1642 makes provision for

proving the statutes of another State; and section 1635 makes provision for proving the records and judicial proceedings of another State. But there is no statutory provision in Kentucky for proving the construction or *interpretation* of such foreign laws. Here, therefore, there is an implied legislative sanction for the Kentucky courts' ascertaining the true meaning and interpretation of such foreign laws by taking judicial notice (as they do and as this Court does) of the decisions of the court of last resort of the State which enacted such laws. How will this Court determine for itself whether the Court of Appeals of Kentucky took judicial notice of the Indiana decisions? There is no local law or decision denying such right. Obviously, this Court must look to the opinion of the Kentucky court in this case, and where it does appear, both in the opinion of the court and in the dissenting opinion, which have been made a part of this record, that the lower court did, in fact, take judicial notice of the Indiana decisions in undertaking to arrive at the interpretation placed upon the statute in question by the highest court of the enacting State, this Court will assume it did so rightfully.

As was said by this Court in *Renaud v. Abbott*, 116 U. S. on p. 285:

"This court, upon writ of error to the highest court of a State, does not take judicial notice of the law of another State, not proved in that court and made part of the record sent up, unless by the local law that court takes judicial notice of it. *Hanley v. Donoghue*, *ante* 1. But the Supreme Court of New Hampshire took judicial notice, and rightfully, we are bound to assume, under the law and practice of that State, of the law of Louisiana on the point." * *

So, in the case at bar, while it does not affirmatively appear that there is a statute of Kentucky directly applicable to the question here, or requiring the court of last resort of Kentucky to take judicial notice of the decisions of the court of last resort of another State for the purpose of ascertaining the true meaning and interpretation of a statute of the enacting State, there is no statute precluding the Kentucky court from taking such judicial notice; and the Kentucky court having taken such notice in this case of all the decisions, except the Kinney case, on which we rely, this court is bound to assume that the Kentucky court rightfully did so, on the authority of the case last cited.

There can not be the slightest doubt that all the Indiana cases cited on our brief except the Kinney case, construing the statute involved in this case, are a part of the record on this writ of error, authorizing this Court to look to said decisions in order to determine what the Indiana statute means. And if this Court will do so, it will be manifest that the Indiana Supreme Court would not have held that Melton was entitled to the benefit of the statute, had he brought his suit against plaintiff in error in Indiana, where the injury occurred, as he might have done. The Kinney case simply illustrates and emphasizes what the Indiana court meant when it said in the Lightheiser, Houlihan and Bough cases that, in order to apply the statute in behalf of railroad employes without exceeding Constitutional limits, it must be confined to railroad perils, as discussed in our original brief.

III.

In another part of the brief for defendant in error it is suggested that the "only Federal question involved, or which was relied upon in the State court, was the

one single question as to whether the statute in question, applied to the facts of this case, denied to the plaintiff in error the equal protection of the law." We have already shown that the question is broader than as thus stated; that it embraces the whole of Sec. 1, of Art. 14, amendments to Const. U. S.—as well the "due process" as the "equality" clause thereof. But, we think the Court can go further, and consider whether the judgment of the Court of Appeals of Kentucky in construing the statute as embracing Melton, violates the "full faith and credit" clause of the Constitution, as argued in our original brief. It is true that plaintiff in error did not expressly plead and rely on that provision of the Constitution. But we think its assignment of error (B. p. 174) is broad enough to raise this question on authority of that part of sub-division 4 of Rule 21 of this Court, which provides "but the court, at its option, may notice a plain error not assigned or specified."

When the Kentucky court held that Melton came within the statute, notwithstanding the Indiana court of last resort had so construed the statute as to exclude Melton from its operation, the necessary effect of the judgment of the Kentucky court was to deny full faith and credit to the public act of Indiana under which Melton sued.

This being true, we see no reason why the Court shall not, under that part of rule 21 above quoted, notice the error that the Kentucky court refused to give "full faith and credit" to the public act of Indiana, although not specifically assigned as error. But it is not necessary that we should succeed in maintaining this proposition, which is merely supplementary to our main reliance on the Fourteenth Amendment, in order to entitle

plaintiff in error to a reversal of the judgment of the court below.

We will not take the time of the court to reargue the effect of the Indiana decisions, and of the opinion of this Court in the Tullis case. Counsel for defendant in error concede that in all the cases in which the statute was upheld as applied to railroads the employe was engaged in train operation and train service—in hazardous employment—when he was injured. We concede the constitutionality of the statute as to such employes. But the argument of the other side ignores the opinions in the Houlahan, Lightheiser and Bough cases, and the decisions of this Court and of the Supreme Courts of Iowa, Minnesota, Kansas and Mississippi which are cited approvingly in one or more of the three Indiana cases last cited—to say nothing of the decision in the Kinney case, which conclusively shows and illustrates what the Indiana court meant when it held in the other three cases that the statute could only be constitutionally applied to those employes of railroad companies who were exposed to the hazards peculiar to railroading.

We think there is no force in the argument that neither the opinion of this Court in the Tullis case, nor the certificate from the United States Circuit Court of Appeals showed whether or not Tullis was employed in train service, and in the inference counsel would have this Court draw from that fact, that it is immaterial whether Tullis was or was not so employed. As we show on page 6 of our original brief, the opinion of the Circuit Court of Appeals *does* show that Tullis was employed as a freight train brakeman, and was injured in a collision between a pusher engine and the caboose in which he was riding. The statute was, therefore, constitutional as applied to Tullis. It could not have been stated in the certificate that he was not engaged in

a hazardous branch of the railroad service, for he was. Therefore, to argue that the application by this Court of the statute to Tullis' case, is the equivalent of holding that the statute is constitutional as to *all* railroad employes, whatever their vocations, is not only to give the statute a scope which this Court certainly did not give it in the Tullis case, but is to utterly disregard all the decisions of the Supreme Court of Indiana since that court held that the statute, which in terms embraced all corporate employes, is only valid as to *railroad* employes, and is only valid as to them when they are injured as a result of the *hazards peculiar to railroading*, and which do not obtain in other than railroad employments.

What we have said as to the Tullis case, applies equally to the Ross case. Ross, as shown by the record in his case, was a railroad brakeman, injured while coupling cars. His employment was unquestionably extra hazardous—was one peculiar to railroading.

IV.

We think the argument we made on pages 53, 54 of our original brief, sufficiently answers, and demonstrates the fallacy of the argument made on pages 17 and 18 of defendant in error's brief, that the Kentucky court had the right to construe the Indiana statute for itself without reference to how the Indiana court has construed it, and that this court will do likewise. We understand it to be a well-settled rule in this Court that it will and feels itself bound to accept the construction of a statute placed upon it by the highest court of the State which enacted the statute. It was the duty of the Kentucky court to do likewise. In failing so to do, and in construing the statute as embracing Melton, the Kentucky court

has, in effect, held that the Indiana statute means an entirely different thing from that which the Indiana court holds it to mean.

It is merely begging the question to say that the Kentucky court found *as a fact* that Melton was embraced by the statute. The question of whether he was or not on the conceded facts, is a question of law, and is to be determined by the construction which the Indiana court has put upon the statute which furnishes the foundation of his action. In determining that question this court will not be controlled by the opinion of the Kentucky court, but will look to the opinions of the Indiana court construing the statute and decide for itself whether, as thus construed, Melton is or is not embraced by the statute he has sued and relies on herein.

In *Eastern Building &c. Assn. v. Williamson*, 189 U. S. 122, the question was as to whether or not the law of New York had been rightly construed by the South Carolina courts. The Court said:

"While statutes and decisions of other States are facts to be proved, yet when proved their construction and meaning are for the consideration and judgment of the courts in which they have been proved. Nor is the rule changed by the testimony given in the deposition of defendant's counsel, for, as he states, his opinion is based on the statutes, the articles of incorporation and the decisions admitted in evidence, together with similar decisions of other States under like statutes, articles of incorporation and by-laws. No witness can conclude a court by his opinion of the construction and meaning of statutes and decisions already in evidence. *Laing v. Rigney*, 160 U. S. 531. The duty of the court to construe and decide remains the same."

And this court went on to hold that the South Carolina courts had correctly construed the New York law.

To the same effect as the case last cited, see *Finney v. Guy*, 189 U. S. 335.

Now, by analogy of reasoning, if it is the right and duty of this Court to construe for itself a statute or decision which has been proved by a witness and whose testimony has been received as to the meaning of such statute or decision, it seems clear to us that on a writ of error from this Court to review the judgment of the highest court of one State construing a statute of another State, this Court has the undoubted right to construe for itself the statute under which the action is brought and will give the greatest weight and consideration to the opinions of the court of last resort of the State which *enacted* the statute, in order to determine whether the courts of the State of the *forum* have correctly construed and interpreted the statute. Otherwise, how could this Court ever consider or decide a case of this character? We contend that the Kentucky court has given the statute a meaning it does not properly bear. In proof of this, we call attention to the limitations which have been placed upon the statute by the court of last resort of the enacting State. And we are met with the argument that the only construction of the statute to which this Court will give heed, is that placed upon it by the Kentucky court—the court which we say has *misconstrued* the statute. It seems to us the mere statement of the proposition carries its own refutation.

It is a complete answer to that part of the argument on the other side that a State may classify objects of legislation, and that, therefore, the construction which the Kentucky court has put upon the statute does not render it to that extent unconstitutional, to say that the Indiana court, in the opinions relied on, has recognized the rule contended for; but, in so doing, has held

"but the classification must furnish a reason for, and justify the making of the class; that is, the reason for the classification must inhere in the subject matter, and rest upon some reason which is natural and substantial" (Bough and Kinney cases.) And further recognized that to classify all railroad employes, without reference to the nature of their employments, and give them a remedy not given to other corporate employes or to non-corporate employes, was an unreasonable classification, forbidden by the Fourteenth Amendment.

The test is not, as our opponents seem to argue, that the Kentucky court concludes that a classification in the statute which would embrace Melton would be constitutional, but is whether he comes within the statute as the Indiana court has held it must be limited in order to keep it within constitutional bounds.

Again, the argument made and authorities cited, on page 23 *et seq.* of the brief on the other side, to the effect that legislation which treats all persons brought within its influence alike under the same conditions is constitutional, is "only half the truth", as was said by the Supreme Court of Minnesota in *Johnson v. R. Co.* 43 Minn. 222, 45 N. W. 156, 8 L. R. A. 419, and is quoted approvingly by the Supreme Court of Indiana in *Bedford Quarries Co. v. Bough*, 168 Ind. 671, 80 N. E. 529. "It has been sometimes loosely stated that special legislation is not class 'if all persons brought under its influence are treated alike under the same conditions', but this is only half the truth. Not only must it treat alike, under the same conditions, all who are brought 'within its influence', but in its classification it must bring within its influence all who are under the same conditions. Therefore, if a distinction is to be made between railway corporations and other employers as respects their liability to their employes, it must be based upon some

difference in the nature of the employment, and can only extend to cases where such difference exists." And the Minnesota court went on to hold (and the Indiana court, in the Bough case approved) that the true rule was that an employers' liability act, applicable to railroads alone, could be held constitutional only when it was applied "to those employees who are exposed to the peculiar hazards incident to the use and operation of railroads, and whose injuries are the result of such dangers."

The record shows that the work defendant was doing when hurt was similar to the work done by carpenters for employers other than railroad companies. See pages 61, 67, 70, 75, 80, 84, 85, and 99, Record.

Counsel for defendant in error argue that the Act is constitutional as applied to *all* railroad employees, because it embraces the employees of all railroads. But the Indiana court holds that the Act cannot be constitutionally applied to any employees of railroads except those who are exposed to the hazards of operating railroads, for the reason that to apply the Act to all employees of railroads would be to bring within its influence many railroad employees who are exposed to no greater perils than are the employees of other corporations, or of individuals; and that to hold the statute to apply to *all* railroad employees, would constitute such class legislation as to those railroad employees not engaged in the hazardous work of operating the railroad, as to make the statute obnoxious to the Fourteenth Amendment.

The doctrine of *G. C. & S. F. Ry. v. Ellis*, 165 U. S. 150, cited in our original brief, was re-affirmed by this Court as recently as February 1, 1910, in *Southern Ry. Co. v. Greene*, U. S. Supreme Court Reporter (L. Ed.) for April 1, 1910, p. 287, where this Court held that an Alabama tax statute imposing a tax upon a foreign railway corporation doing business in the State, which was

not imposed upon a domestic corporation carrying on the same business within the State, deprived the foreign corporation of its property without due process of law, contrary to the Fourteenth Amendment. In the course of that opinion the Court used this language:

"The Federal Constitution, it is only elementary to say, is the supreme law of the land, and all its applicable provisions are binding upon all within the territory of the United States. Whenever its protection is invoked, the courts of the United States, both State and Federal, are bound to see that rights guaranteed by the Federal Constitution are not violated by legislation of the State. One of the provisions of the 14th Amendment, thus binding upon every state of the Federal Union, prevents any state from denying to any person or persons within its jurisdiction the equal protection of the laws. If this statute, as it is interpreted and sought to be enforced in the state of Alabama, deprives the plaintiff of the equal protection of the laws, it cannot stand.

"The equal protection of the laws means subjection to equal laws, applying alike to all in the same situation. If the plaintiff is a person within the jurisdiction of the State of Alabama within the meaning of the 14th Amendment, it is entitled to stand before the law upon equal terms, to enjoy the same rights as belong to, and to bear the same burdens as are imposed upon other persons in a like situation.

"That a corporation is a person, within the meaning of the 14th Amendment, is no longer open to discussion."

The prohibitions of the 14th Amendment, against depriving any person of life, liberty, or property without due process of law, or denying the equal protection of the law, extend to all acts of the State whether through its legislative, its executive, or its judicial authority. *Scott v. McNeal*, 154 U. S. 34. To the same effect see *Raymond v. Chicago Traction Co.*, 207 U. S. 20, 36.

Givens v. Southern Ry. Co., 49 So. Rep., 180, decided April 26, 1909, is an illustrative and instructive case. By section 193 of the Constitution of Mississippi of 1890, it is provided that:

"Every employe of any railroad corporation shall have the same right and remedies for any injury suffered by him from the act or omission of said corporation or its employes, as are allowed by law to other persons not employes where the injury results from the negligence of a superior agent or officer, or of a person having the right to control or direct the services of the party injured, and also when the injury results from the negligence of a fellow-servant engaged in another department of labor from that of the party injured, or of a fellow-servant on another train of cars, or one engaged about a different piece of work. Knowledge by any employe injured, of the defective or unsafe character or condition of any machinery, ways, or appliances, shall be no defense to an action for injury caused thereby, except as to conductors or engineers in charge of dangerous or unsafe cars, or engines voluntarily operated by them. Where death ensues from any injury to employes, the legal or personal representatives of the person injured shall have the same right and remedies as are allowed by law to such representatives of other persons. Any contract or agreement, express or implied, made by any employe to waive the benefit of this section shall be null and void; and this section shall not be construed to deprive any employe of a corporation or his legal or personal representative, of any right or remedy that he now has by the law of the land. The legislature may extend the remedies herein provided for to any other class of employes."

Givens was employed as a laborer on a bridge crew. He was returning from work on a push car which was followed by a lever car. At a point on the journey the latter car slackened its speed and fell behind the push car, leaving a space between the two cars. One of the bosses ordered Givens to dismount from the front car and stop the car. Givens did so, acting under an order of a superior, which it was his duty to obey. While Givens was attempting to stop the push car, believing that the lever car behind him would be stopped before it reached

him, he was struck by such lever car, knocked down, run over, and injured. Givens sought a recovery under section 193 of the Mississippi Constitution, *supra*. But the Supreme Court of that State held he was not entitled to recover, thereby affirming the judgment of the lower court which peremptorily instructed the jury to find for the railroad company. In the course of its opinion the Mississippi court referred to *Ballard v. Cotton Oil Co.*, 81 Miss. 507, 62 L. R. A. 407, and other decisions of the same court, and held that they settled, beyond further debate, certain propositions enumerated in the opinion. The second of those propositions is thus stated by the court: "That the only reason why section 193 can be upheld as constitutional is as held by the United States Supreme Court in repeated adjudications referred to in the three cases, *supra*, that such classification of such railroads proper, can be properly maintained only because of the fact of the inherent danger attending the operation of such railroads by the highly dangerous agency of steam; in other words, because such commercial railroads do imperil the lives of their employes, by reason of the inherent danger of the operation of such railroad trains."

The Mississippi cases are not only ably and learnedly reasoned, but the Givens case is significant in that it was brought under a provision of the State Constitution, and not a mere act of the legislature, and the court of last resort of Mississippi found it necessary to limit and restrict the language of the Constitution of that State in order that it might not come in conflict with the 14th Amendment to the Constitution of the United States, by holding that the Constitutional provision could not be applied to Givens case. As the Supreme Court of Mississippi held in *Ballard v. Mississippi Cotton Oil Co.*,

supra, "Our conclusion, after the most careful and protracted consideration, is that section one of the Act of 1898 (Acts 1898 Chap. 66, p. 85) violates the 14th Amendment of the Constitution of the United States, in that it imposes restrictions upon all corporations without reference to any difference arising out of the natures of their businesses, which are not imposed upon natural persons, and thus denies to corporations the equal protection of the law. We are, therefore constrained to declare the said act unconstitutional".

The act last referred to was enacted by the Mississippi Legislature pursuant to section 193 of the Constitution of that State.

We do not think it necessary to notice in detail the argument made on pages 26 *et seq.* of the brief on the other side. The first part of the argument is fully answered by the opinions of the Supreme Court of Indiana, and the rest of the argument may be answered in a few words. It is wholly immaterial what work Melton did on other days. On the day he was hurt, he was helping construct a coal chute. He was not exposed to any of the perils of railroading, and was not injured as a result of any such peril. He was not on a train, or injured by a train. There was no train there. He was a carpenter, doing carpenter's work—not on the tracks, but near thereto and alongside thereof. The bent of timber, the falling of which injured Melton, would have produced, or might have produced, a like result if he had been working for the coal company in erecting the chute a mile away from, instead of for the railroad company, nearby its tracks. We have argued this question so fully in our main brief that it is needless to repeat the argument here. We would not mention the matter again at all, except for the apparent earnestness with which our opponents make the attempt to bring Melton's work

within the class of railroad hazards covered by the statute—which, we think, it is perfectly plain it was not.

We can not see that *Martin v. Railroad Co.* 203 U. S. 284, relied on by defendant in error, has any bearing upon this case. We do not contend that the construction which the Kentucky court has placed upon the Indiana statute alone raises the Federal question involved. Our contention goes further, and claims that, when construed so as to embrace Melton within its terms, the Indiana statute contravenes the Fourteenth Amendment; and that the decisions of the Supreme Court of Indiana are conclusive of the proposition that the statute is unconstitutional if it is not so limited by construction as to exclude Melton (a non-hazardous railroad employe) from its benefits.

It is a novel doctrine contended for on page 40 of the brief on the other side that this Court is bound by the construction the Kentucky court has put upon the Indiana statute. It is the rule, we understand, that this Court will invariably accept the construction of a statute by the highest court of the State which enacted the statute. But we can recall no case in which this court has held that it felt itself at all bound to accept the construction of a statute of *one* State by the highest court of *another* State.

If the rule is as we have just indicated, rather than as contended for by opposing counsel, then instead of the Court's being bound by the construction the Kentucky court has put upon the statute, it will feel itself bound to accept that construction which the Indiana court has put upon it, and, in so doing, to hold that the judgment of the Kentucky court is palpably and fatally erroneous.

We have anticipated, in our original brief, the citation by counsel for defendant in error of the Walker and

Foland cases, decided by the appellate court of Indiana an intermediate court of that State. The Clerk of the Supreme Court of Indiana informs us that on April 6, 1910, appellant's petition to transfer the Foland case to the Supreme Court of Indiana was granted by the latter court. See page 58 of our original brief.

VI.

We do not deem it necessary or profitable to consider the cases discussed on page 41, *et seq.* of the brief on the other side. We concede, as we did in our original brief, that the Supreme Courts of Georgia, Texas and North Carolina have inclined to a more latitudinary construction of the classes of railroad employes who may be constitutionally embraced within an employers' liability act relating to railroads only, than has been given to like statutes by the Supreme Courts of Indiana, Iowa, Minnesota, Kansas and Mississippi. But we are not concerned with the construction given by the first named courts to statutes of their own States. We are only concerned with the meaning of the statute of Indiana which the court of last resort of that State has felt compelled to give it, in order to uphold it as a constitutional exercise of legislative power. The Indiana court accepted the views on this subject which had theretofore been expressed by the Iowa, Minnesota, Kansas and Mississippi courts, rather than those entertained by the Georgia, Texas and North Carolina courts.

As against *Callahan v. Ry. Co.* 170 Mo. 473, 71 S. W. 208, relied on in defendant in error's brief, we ask the court to read *Sams v. R. Co.* 73 S. W. 686, decided after the Callahan case was decided by the Supreme Court of Missouri. The Sams opinion clearly shows that that

court would not apply the Missouri statute in favor of a carpenter, such as Melton was (Record, p. 158), and that the statute is limited to railroad employes who are engaged in the work of operating railroads.

The reference to the Federal Employer's Liability Act, on page 50 of defendant in error's brief, is inapplicable here for the reason that neither in the Howard Brooks nor Gutierrez cases was any question made as to whether it was competent for Congress to enact a statute applicable to all railroad employes, without regard to the branch of service in which they were engaged. In other words, there was no question of classification in those cases. Howard and Brooks (207 U. S. 463) were both locomotive firemen, as the records in those cases showed, and no question could have been made that they were not engaged in a hazardous branch of railroad service—in train operation or movements. The opinion in the Gutierrez case does not show how he was employed, but the opinion does show that no question of classification was made or decided. Nor could any such question have been made in *Pierce v. Van Dusen*, 78 Fed. 693, referred to in the brief on the other side, for the reason that Van Dusen, as the records showed, was employed as a yard brakeman—an extra-hazardous employment.

VII.

In conclusion: It is stated on page 18 of the brief on the other side that in considering the constitutional question presented on this writ of error "this Court is bound by no decision of any inferior court, Federal or State", and that as to whether the Indiana statute as construed and applied by the Court of Appeals of Kentucky, "violates the provisions of the Federal Constitution this Court is the final arbiter", etc. We understand,

then, the proposition comes to this: That this Court should decide, without reference to what any other court has held, whether or not it is competent for State legislatures to enact employers' liability statutes, applicable to railroad employes only, and embracing within their benefits *all* employes of railroads, without reference to the nature of their employments, without contravening the Fourteenth Amendment.

All of the courts which have construed such statutes, seem to recognize that "the line must be drawn somewhere". The question has been as to where the line should be drawn. The Indiana, Iowa, Minnesota, Kansas and Mississippi courts have drawn the line clearer and tighter than the Georgia, Texas and North Carolina courts have done. All of the courts seem to recognize there must be a justification for the classification, and that the capricious and arbitrary embracing of *all* railroad employes, whether train employes, or accountants, stenographers, typewriters, ticket agents and carpenters, while excluding all employes of other employers similarly employed from the benefits of the statute, is obnoxious to the Fourteenth Amendment.

We submit that the views of the Indiana (whose statute we are dealing with in this case), Iowa, Kansas, Mississippi and Minnesota courts are supported by sounder logic and better reasoning than are the opinions of the Georgia, Texas and North Carolina courts. And we feel confident that if this Court shall adopt the suggestion of the other side and decide whether the Indiana statute is constitutional unless limited to the extra-hazardous employments incident to the railroad service, without reference to how any other court has decided the question, that this Court will reach the conclusion that no State, having, as it does, the undoubted power to enact a statute abolishing the doctrine of fellow-serv-

ant, contributory negligence and assumption of risk as to all employes of all employers within the State, has the constitutional right to arbitrarily enact a statute, partial in its operation, and applying only to one sort of employes, unless the classification is reasonable and furnishes a justification for making the class. Certainly all railroad employments are not more hazardous than those of all other vocations. Less than 20% of railroad employes are engaged in train operation and train service. Assuming that the latter are entitled to more protection than persons in other than railroad vocations, surely that is no reason for giving the same protection to the 80% of railroad employes whose vocations are not attended with extra hazard—whose work is no more hazardous because done for a railroad company than it would be if done for any other character of employer, corporate or individual.

The essential principle of free government, without which no people can be said to be free, is "equality under the law." The idea was expressed in Magna Charta as "the law of the land". In the Federal Constitution and in many of the State Constitutions the same thought is expressed in the words "due process of law". But, however expressed, the principle is fundamental, and is given but little added weight by being expressed in the organic law. The expression is usually, if not always, found in the Bill of Rights of State Constitutions, and the first ten amendments to the Federal Constitution have frequently been called the "Bill of Rights" of that Constitution (*Monongahela Nav. Co. v. U. S.* 148 U. S. on p. 324), and it has long been recognized that all of such parts of the Constitution are merely declaratory of fundamental principles rather than the enactment of positive laws.

In the innumerable complications that have come into modern life, it has been found necessary in order to

equalize the burdens of life to give additional protection to some, not given to the general masses, and it being frequently impossible to bring about equalization by merely giving protection, the principle of compensation is added, but should always be for the same purpose and to accomplish the same end. There are two ways in which a law may fail to afford equal protection. One is by selecting certain favored persons or classes of persons, and giving them more protection than is enjoyed by the masses, and the other is by giving certain persons or classes less protection than is generally enjoyed. If this additional protection and compensation are given for the purpose of equalizing the protection of the laws of the land, in other words for the purpose of making the laws operate equally by, so to speak, compensating for the extra burdens which some citizens must carry more than others, then it is in harmony with the spirit of the law and republican institutions. If it is not, then it is forbidden by the Constitution and the essential principles of Republican Government.

In the varied forms of industry in this country men must be found to perform work involving great hazard to life, while the employments of others involve little or no such hazard. When the legislative department of the government undertakes to require of employers additional protection by way of safeguards and otherwise with a view to reducing and protecting against the extra hazards involved, the person whose occupation or employment involves no hazard is not discriminated against; and when, notwithstanding all the precautions which the government by positive enactment can give, there still remains unusual hazard to life, it is to accomplish the same purpose and supported by the same principle that the element of compensation is added. In employers' liability acts, and in the one under consider-

ation, are found both the elements of protection and compensation. Thus the elimination thereby of the doctrines of fellow-servant, contributory negligence and assumed risk partakes more directly of the element of compensation than of protection, and yet indirectly it may also be said to operate as a protection. When this apparent advantage is given for the purpose of equalizing, it ought not to be a legitimate subject for complaint, but when given as a preference, operating as a discrimination in favor of a class arbitrarily selected and against all others, although many of them are similarly employed and circumstanced, it becomes wholly unjustifiable in a republican form of government.

Therefore, it is wholly inconsonant with the reason for the rule, if the employes shall be selected with reference to the character of their *employer* rather than with reference to the character of their *employment*. The former constitutes no rational basis for classification, because it always appears that a given employer, for example a railroad company, has employes (a large majority in fact) whose occupations involve no hazard to life at all, and others whose occupations involve great hazard to life. There is no reason for giving an employe with a non-hazardous occupation any advantages over the employes of other employers similarly situated; and to afford any such advantage by way of compensation, in eliminating as to them defenses applicable to the general masses of the people, or any preference in any other way, is to arbitrarily make them the favorites of the government, which is as repugnant to the basic principles of free government as open and avowed anarchy would be. How could, for instance, the employment of a railroad clerk, whose duties do not require him to leave a comfortable room, well warmed and lighted, be compared with the duties of a freight brakeman on top of a car in

a moving freight train covered with sleet and ice on a dark winter night? While the government may be justified in trying to cancel, so to speak, the extra hazard in the employment of the brakeman by as much protection and compensation as may be thought necessary for this purpose, what possible excuse can be given for affording *any* advantage to the clerk over any other employe of any other person?

Our conclusion, therefore, is that there cannot be under our Federal and State Constitutions any classification of persons, whereby preference is given to one class over others, unless it be upon some rational basis, where the object and purpose of the legislation is to afford equal protection rather than to establish preferential classes. These facts, we think, are sustained by a review of the authorities discussed in our original brief and not necessary to be again referred to.

Therefore, we submit with confidence, that if this Court is called upon to decide, regardless of what the Indiana court has decided, as to whether the Indiana statute can be constitutionally upheld as to railroad employes, when no other classes of employes are embraced by the statute, and upheld as to *all* railroad employes, without reference to whether their employments are attended with extra hazard—are attended with greater hazard than are incident to the employments of all other classes of persons except those who work for railroads—that this Court will conclude, as the highest courts of Iowa, Minnesota, Indiana, Mississippi and Kansas have done, that such legislation can not be upheld as to *all* railroad employes; that such legislation is constitutional when limited to the hazards peculiar to the operation of railroads, but is unconstitutional when extended further; and will further hold that the judgment of the Kentucky court extending the benefits of the

Indiana statute to the defendant in error, whose employment did not expose him to any perils peculiar to railroad operation, is erroneous and that the statute, as so construed, is unconstitutional and void because it deprives plaintiff of error of its property without due process of law, and denies to it the equal protection of the laws in violation of the Fourteenth Amendment to the Federal Constitution.

We respectfully ask that the judgment be reversed in accordance with the prayer of our original petition.

Respectfully submitted.

BENJAMIN D. WARFIELD,
Counsel for Plaintiff in Error.

HENRY LANE STONE,
Of Counsel.

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United Supreme Court U. S.
FILED
APR 27 1910
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States

OCTOBER TERM, 1909

No. 180

Louisville & Nashville Railroad Company - Plaintiff in Error

VS.

Spencer Melton - - - - - Defendant in Error.

Supplemental Reply Brief for Plaintiff in Error--
Being Opinion of Supreme Court of Indiana
in the Cleveland, Cincinnati, Chicago & St.
Louis Railway Company v. William H. Foland
Delivered April 20, 1910.

BENJAMIN D. WARFIELD,
Counsel for Plaintiff in Error.

HENRY LANE STONE,
Of Counsel.



Supreme Court of the United States.

OCTOBER TERM 1910

No. 180

LOUISVILLE & NASHVILLE RAILROAD COM-
PANY, - - - - - Plaintiff in Error,

vs.

SPENCER MELTON, - - - - - Defendant in Error.

SUPPLEMENTAL REPLY BRIEF FOR PLAINTIFF IN ERROR—BEING OPINION
OF SUPREME COURT OF INDIANA IN THE CLEVELAND, CINCINNATI,
CHICAGO & ST. LOUIS RAILWAY COMPANY v. WILLIAM H. FOLAND
DELIVERED APRIL 20, 1910.

THE STATE OF INDIANA,

In the Supreme Court, November Term, 1909

*On the 20th day of April (1910), being the 129th
Judicial day of said November Term, 1909.*

No. 21651

HON. JOHN V. HADLEY, CHIEF JUSTICE
HON. LEANDER J. MONKS,
HON. QUINCY A. MYERS,
HON. JAMES H. JORDAN,
HON. OSCAR H. MONTGOMERY, } JUSTICES

IN THE CASE OF

THE CLEVELAND, CINCINNATI,
CHICAGO & ST. LOUIS RAIL-
WAY COMPANY,

vs.

WILLIAM H. FOLAND.

APPEALED FROM THE
DELAWARE CIRCUIT COURT.

*Come the parties by their Attorneys, and the Court
being sufficiently advised in the premises, gives its opinion
and judgment as follows, pronounced by Myers, J.—*

This was an action by appellee against appellant for
alleged negligence.

The material portions of the complaint, which is in
one paragraph, are, that appellee was an employee, and
servant of appellant, as a laborer engaged in the work

of bridge building and with other employes of appellant was engaged in preparing the foundation for abutments for a bridge:

"That the plaintiff and the other employees with whom he was so engaged, constituted a force of men called a "Bridge Gang," and the defendant appointed and constituted one William Litton Superintendent, Foreman and Boss over said gang and gave and delegated to him power and authority to provide the ways, works, tools, machinery and appliances with which to do and perform said work and to direct the manner and means of doing the same and to order and direct and control the service and work of each and all of said gang, including this plaintiff, and to order, direct and command each of said employees, including this plaintiff, as to what particular service they and each of them were to perform and the particular place they and each of them should occupy in performing said work, and it was the duty of each of said employees, including this plaintiff, and they were each bound so to do, to conform to and obey each and every order of said Litton in and pertaining to all matters connected with said work and the performance thereof.

That on said 3rd day of January, 1905, there were at said place a great number of piles, each consisting of a heavy piece of timber about forty feet in length and eight to twelve inches in diameter, which had been previously driven into the ground about half the length, leaving about twenty feet in length of the upper end of each projecting above the level and surface of the earth.

That prior to said date there had been prepared an excavation or pit in which piling was to be driven, and that said piling which had been so previously driven as aforesaid, had been braced and fastened together at the top by spiking a heavy board across the tops thereof and from one to another so that they were firmly stayed, supported and held in place and kept from falling.

That on said day said piles were so braced and stayed as aforesaid and secured so that none of them

could fall, and while they were in said condition the said Litton ordered and directed this plaintiff to go into said pit or excavation and act as pile steerer and then and there ordered and required others of said employees to operate a crane derrick and others to operate a pile driver and others to saw off at the ground level said piles so partially driven, and then and there ordered and directed said employees in charge of said crane derrick to lash a chain and rope around the tops of said piles, one by one, and after the same were so sawed off by said other employees to raise them one by one, by means of said derrick and swing them in turns over said pit or excavation and it then became and was the duty of this plaintiff under his said employment and the order of said Litton to seize the lower end of each pile and steer it to its proper place to be driven and when so steered and placed, the same to be lowered by the said derrick and then driven by said employees in charge of said pile driver.

That the place where the plaintiff was so required to do and perform his duty as aforesaid was so located that if said pile so partially driven should fall, they would fall against and upon him; that plaintiff and all said employees obeyed said Litton and that while the plaintiff and said other employees were so engaged as aforesaid, the said Litton ordered, directed and required said employees so engaged in sawing off said piles, to saw all of them without waiting for the derrick men, which said men so engaged in sawing at once did, leaving only a small part of each pile unsawed and not leaving sufficient amount to support the weight of said piles or prevent them from falling, without the support of said stays at the top.

That after said piles were so sawed and the plaintiff was so engaged in said duty at the point where he was so ordered and required to be, the said Litton ordered and required others of said employees, without the knowledge or consent of the plaintiff, to go above and to the tops of said piles and with crowbars pry loose said brace

and stay, which they did, all without the knowledge or consent of the plaintiff and without any notice to him whatever.

That as soon as said brace and stay was loose as aforesaid, one of said pilings of great weight fell upon and against the plaintiff while he was at the point where he was so directed and required to be, whereby his left leg was crushed and broken in such a manner so that it became necessary to amputate the same."

Then follows description of his injuries and his loss and damage.

"That he received his said injury on account and by reason of the carelessness and negligence of said Litton in ordering and requiring the plaintiff to work in said place as aforesaid and allowing and permitting said defect in the conditions of said ways and works connected with and in use in said business of the defendant and in causing and requiring said brace to be released and removed therefrom, and causing and permitting said piling to fall, all of which was removed by same, all without notice to the plaintiff. That each and all of said acts and orders and directions done and given by said Litton were done and given as such foreman and superintendent for and on behalf of this defendant.

That the plaintiff had no notice or knowledge whatever that said brace had been so released or removed or of the danger occasioned thereby until said piles fell and injured him."

If the theory of this complaint is that of liability under the employers liability act, Burns 1908, Section 7083, no cause of action is stated, for the reason that it appears that appellee was not engaged in the train service, and the rule is settled in this state, that the reason for the statute, and the basis upon which its constitutionality is grounded, is, that of the hazards attending the operation of trains. Indianapolis, etc., Co. v. Kinney (1908) 171 Ind. 612, and cases cited.

Appellee's employment and service was in no wise different from that of an employe in the construction of a bridge by any private person or corporation, or by any public authority.

The complaint clearly can not be sustained under the employers liability act.

It seems to have been based, and tried upon that theory, but lest we might be mistaken in that view, we are led to inquire into the sufficiency of the complaint as a common law right of action, and are at once confronted with the proposition as to whether the Superintendent, Foreman and Boss, was a vice principal, or a fellow servant.

The allegation that he was delegated with "power and authority to provide the ways, works, tools, machinery and appliances with which to do and perform the work," are not controlling for the reason that there is no defect alleged in any of these particulars. If there has been, then the duty of providing safe ways, works, tools, etc., being a duty owing by the master, the delegation of the power and authority to provide them would constitute the Foreman a vice principal. *American, etc. Co. v. Hullinger*, 161 Ind. 673, and cases cited. *Dill v. Marmon* (1904) 164 Ind. 507. *Ft. Wayne Co. v. Parsell* (1906) 168 Ind. 223.

His designation as Superintendent has in itself no necessary meaning as constituting him a vice principal; that must be determined from the character of the duties conferred upon him, and not by his rank. *Thacker v. Chicago, etc. Co.* 159 Ind. 82, and cases cited.

Whether one is a vice principal or a fellow servant is not always readily determinable. In *Elliott on Railroads*, Section 1317, it is said, "the term 'vice principal' is generally used to denote an employe to whom the employer has entrusted the performance of a duty which the law requires the employer himself to perform. We think that a superior agent or vice principal is an employe who is entrusted generally with the performance of the master's duties, or is entrusted with the perform-

ance of some of the master's duties, although he may not be entrusted with all the duties of the employer. We believe that where the duty which the law imposes on the employer is entrusted to an employe, the employe is a vice principal as to that duty, although the matter to which it relates may not in the strict sense be a general one." This definition seems to us to be sound, and in accord with our own cases.

It was said in *Thacker v. Chicago, etc. Co.*, *supra*, "A vice principal, therefore, is one who represents the master in the discharge of those duties which the master owes to his servant. If, however, the servant whose negligence caused the injury was not at the time discharging a duty which the master owed to his servants, but simply a duty which the servant owed to the master, he was a fellow servant with others engaged in a common business, and the master would not be liable for any injury inflicted upon such fellow servants by reason of his negligence." See also *Dill v. Marmon* (1904) 164 Ind. 507, 521, and cases there cited.

In *Justice v. The Pennsylvania Co.* 130 Ind. 321, it was held that a section foreman with authority to hire and discharge men was a vice principal as to that duty, but a fellow servant of those working with him. *Alaska Mining Co. v. Whelan* (1897) 168 U. S. 86.

The negligence here charged is that of the foreman in directing the work in which by reason of lack of care in its performance appellee was injured; neglect of the duty the foreman owed the master, and of the duty he owed his co-laborer not to injure him.

To constitute a cause of action there must be a duty shown as owing by the master, and its neglect by him, or by one acting in his stead, or a vice principal, and consequent injury. *Cleveland, etc. Co. v. Morrey*, (1909) 88 N. E. R. 932, and cases there cited.

The complaint shows appellee engaged in a general employment attended with more or less danger, under any circumstances, and no duty is alleged as owing to him by the master which is shown to have been neglected

by the master. The most that is shown is, that one who is not shown to be a vice principal, but at the most a superior fellow servant, by the manner of directing the work caused the injury to appellee.

We see no escape from the proposition that the complaint is not good as a common law right of action.

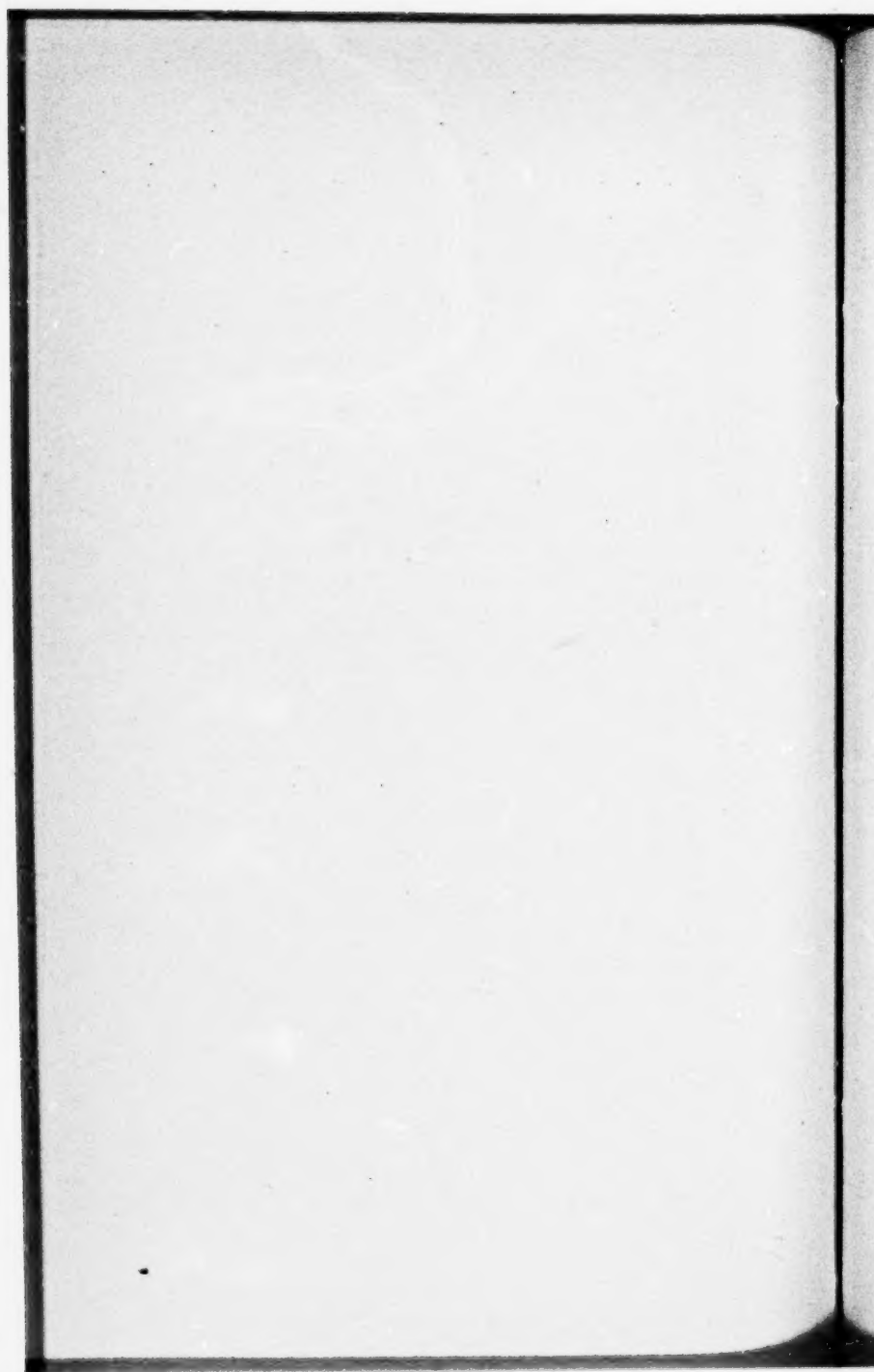
For the insufficiency of the complaint the *judgment* is reversed with instructions to the court below to sustain the demurrer to the complaint, and for further proceedings not inconsistent with this opinion.

STATE OF INDIANA,)
 SUPREME COURT }

I, ED. V. FITZPATRICK, Clerk of the Supreme Court of the State of Indiana, certify the above and foregoing to be a true and complete copy of the opinion and judgment of said Court in the above entitled cause.

IN WITNESS WHEREOF, I hereto set my hand and affix the seal of said Court, at the City of Indianapolis, this 22nd day April, 1910.

EDWARD V. FITZPATRICK, C. S. C.



Office Supreme Court U. S.
FILED

MAR 7 1910

JAMES H. MCKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 180.

Louisville & Nashville Railroad
Company, - - - - - Plaintiff in Error.

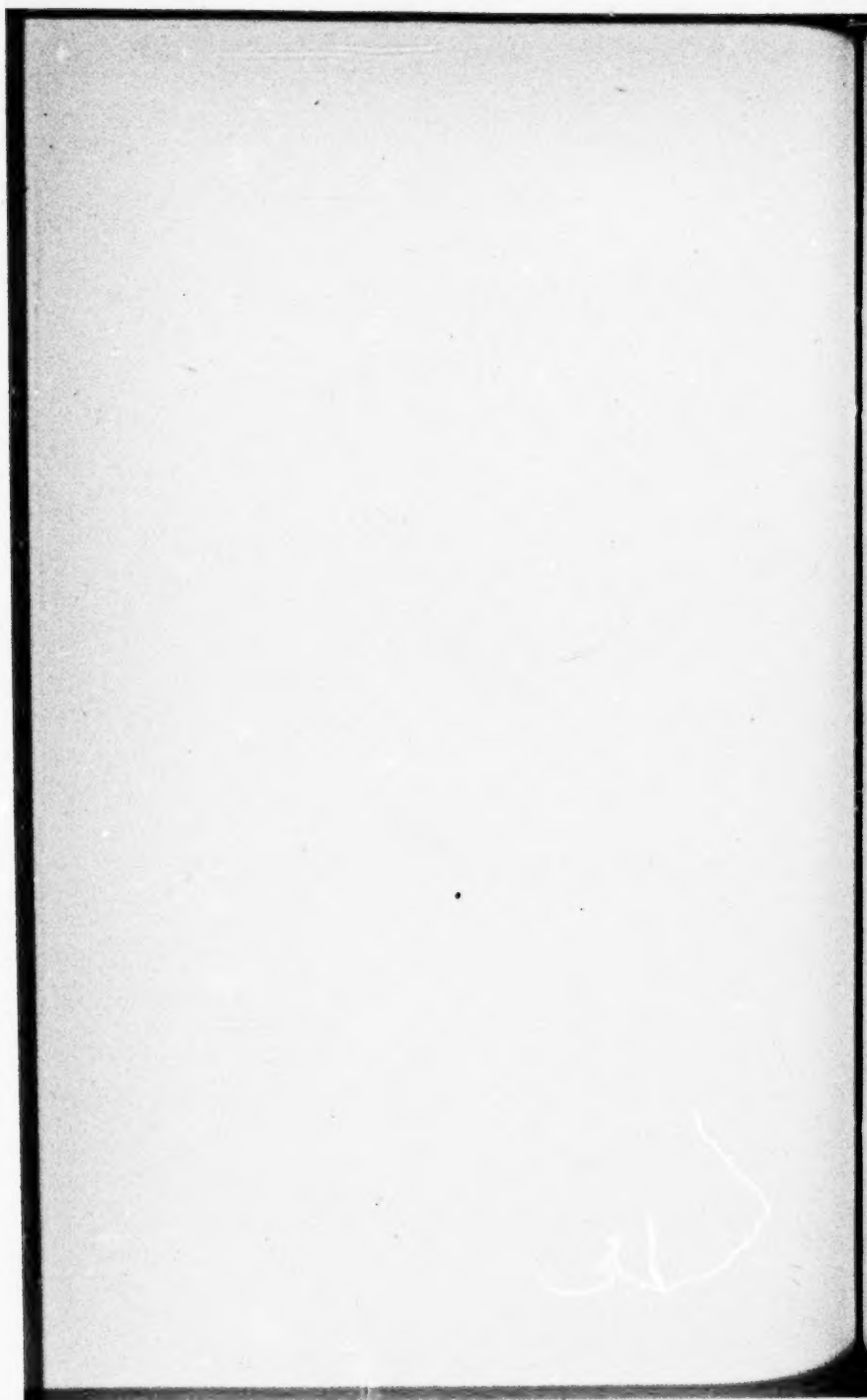
VS.

Spencer Melton, - - - - - Defendant in Error

BRIEF OF PLAINTIFF IN ERROR.

BENJAMIN D. WARFIELD,
COUNSEL FOR PLAINTIFF IN ERROR.

HENRY LANE STONE,
OF COUNSEL.



Supreme Court of the United States.

LOUISVILLE & NASHVILLE RAILROAD COM-
PANY, - - - - - *Plaintiff in Error,*

vs.

SPENCER MELTON, - - - - - *Defendant in Error.*

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The defendant in error, Spencer Melton, sued the plaintiff in error, the Louisville & Nashville Railroad Company, in the Circuit Court of Hopkins County, Kentucky, for damages for personal injuries, and recovered a judgment for \$22,000 dollars, and which judgment was affirmed by the Court of Appeals of Kentucky, the court of last resort of that State (127 Ky. 276).

The case is in this court on a writ of error to the latter court.

Defendant in error predicated his right to recover upon the Employers' Liability Statute of Indiana (R. pp. 7-8), he having received his hurt in that State while employed by plaintiff in error, as a carpenter, and while he was engaged in assisting other carpenters in the erection of a wooden coal tipple or coal chute alongside of, but not on, plaintiff in error's railroad. He was not engaged in railroad operation. His employment was attended with no greater hazard because he was working for a railroad company than it would have been had he been working for any other class of employer.

SPECIFICATION OF ERROR.

The Court of Appeals of Kentucky erred in holding that the Employers' Liability Statute of Indiana can be constitutionally applied to the facts of this case. When so applied the statute violates Section 1 of Amendment Fourteen to the Constitution of the United States. In order to uphold the Indiana statute, which has been construed by the Supreme Court of that State to be applicable to railroads alone, the statute must be construed as applying only to cases of injuries to railroad employes engaged in the extra-hazardous branches of railroad service; to those railroad employments which are more hazardous than employments in any other business. The applicability of the statute must be made to depend upon the character of the employment and not upon the character of the employer. The defendant in error was employed as a carpenter, and, at the time he received the injuries sued for, was engaged in doing ordinary carpenter's work in connection with the erection of a coal tippie or chute at the Ingle Coal Mines, close to, but not on or forming a part of, the railroad of the plaintiff in error, in Indiana. The work defendant in error was doing was no more dangerous to him, merely because he was employed by a railroad company, than if he had been doing the same character of work for an employer other than a railroad company. In the latter event, admittedly the statute would not apply, and there would be no liability under the common law of Indiana. We, therefore, contend that the action of the Court of Appeals of Kentucky in holding the Indiana statute applicable to this case—in holding that defendant in error is entitled to recover under the statute—violates Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it deprives the plaintiff in error of its property without due process of law, and denies to said plaintiff in error the equal protection of the laws. As thus applied, the statute is class legislation, in that the attempted classification of railroads by themselves does not rest upon some difference which bears a reasonable and just relation to the act in respect of which the classification is proposed, but is an arbitrary selection. More-

over, the Supreme Court of Indiana, had the case been before that court instead of before the Court of Appeals of Kentucky, would not have applied the Indiana statute to this case, in view of its opinions construing the statute. This Honorable Court will accept, and the Court of Appeals of Kentucky should have accepted, but did not, the construction which the Supreme Court of Indiana has placed on said statute.

BRIEF AND ARGUMENT.

Plaintiff in error, by proper pleadings, challenged the constitutionality of the Indiana Employers' Liability Act as applied to the facts of this case (R. pp. 20, 21, 26, 27, 28, 143, 144, 147 to 163 inclusive, and 173). Plaintiff in error does not question the right of the Legislature of Indiana to classify railroads in order to impose liability upon them for injuries to their employees incident to railroad hazards. But it does insist that to make this a constitutional exercise of legislative power, the liability of the railroads must be made to depend upon the character of the employment, and not upon the character of the employer. And plaintiff in error denies the right of the Legislature to classify *all* railroad employees and impose liability against their employers and in behalf of such employees, merely as such, without reference to whether the employee is exposed to hazards which are peculiar to the operation of railroads and which do not appertain to other vocations.

In order to sustain such class legislation, and to save it from the condemnation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, such statute must, either by its terms or by judicial construction, be limited so as to apply only in behalf of railroad employees who are exposed to railroad hazards—to those dangers which are peculiarly incident to the operation of railroads, but which are not incident to any other business or vocation. When so limited, such legislation is valid. But when it attempts to go further and impose liability upon railroad companies alone, and in behalf of all their employees alone, regardless of whether their employments are peculiarly hazardous, such legislation

is invalid, at least as applied to employments that are not extra-hazardous. It must be admitted that many employes of railroads are exposed to no greater dangers or hazards than are employes in other than railroad employments.

No one would question the power of a State Legislature to enact a statute abolishing the common law doctrine of fellow-servants and assumed risks as to every employe in the State. But when the Legislature does not do this, but, instead, enacts a statute, partial in its operation, and making only one class of employes the recipients of the legislative bounty, the classification thus made can not be sustained unless it rests upon some reasonable basis. As was said by the Supreme Court of Iowa in *Akeson v. R. Co.*, 106 Iowa 54, 75 N. W. 676, in construing a statute of that State similar to the Indiana statute involved in this case, "The purpose of the lawmakers was evidently not to make men, because employed by railroad companies, favorites of the law, but to afford protection owing to the peculiar hazards of their situation."

And, furthermore, plaintiff in error contends that defendant in error, although employed by the railroad company, was not engaged in an extra-hazardous employment—one peculiar to railroads—such as to justify the application of the statute as to him.

The brief for the defendant in error on his motion to dismiss or affirm, which motion was passed by the court to this hearing on the merits, concedes that the constitutional question is properly raised, and that this court has jurisdiction of this writ of error.

But in said motion of the defendant in error, and in the brief filed in support of the motion, the court was asked to dismiss the writ of error and affirm the judgment upon the grounds that: "(1) It is manifest the writ of error was sued out for delay only; (2) the question on which the jurisdiction depends is so frivolous as not to need further argument."

The affirmance of the judgment by the Court of Appeals of Kentucky carried with it not only the payment of the very large judgment of \$22,000, but also 10% damages, and interest at 6% per annum from the date of

the rendition of the judgment. The plaintiff in error could not afford to prosecute an appeal or a writ of error in any case solely for the purpose of delaying payment of the judgment, because its money is not worth to it 6% per annum, the rate of interest which Kentucky judgments bear. As a matter of fact, plaintiff in error does not, and never has, prosecuted appeals for any such purpose. Nor was this writ of error prosecuted for any such purpose.

We do not know just what counsel for defendant in error had in mind in stating, as the other ground of their motion, that, "the question on which the jurisdiction depends is so frivolous as not to need further argument." The last six words of the sentence would indicate that the question presented for decision on this writ of error has heretofore been decided by the court. It has not, nor can we find that it has ever been raised in argument in any case before this court. Therefore, since this court has not only not decided the question, but has heard no argument upon it, it is difficult to know at what opposing counsel are driving when they state so dogmatically that the question presented needs no further argument. And we think we may be pardoned for saying that we do not think any question involving the rights guaranteed by the Fourteenth Amendment to the Constitution of the United States can properly be characterized as "frivolous."

While admitting that this court has jurisdiction of this writ of error, the argument was put forward by the other side in the brief on the motion to dismiss or affirm, that, inasmuch as the court, in *Tullis v. L. E. & W. R. Co.*, 175 U. S. 348, upheld the constitutionality of the statute involved in this case, *as applied to the facts in that case*, it is no longer competent for a railroad sued under the Indiana statute to question its constitutionality as applied to the facts of *any other case*, regardless of what may be shown as to the character of the employment of the injured employe seeking the benefit of the statute. We take issue with this contention. Our question was not decided in the *Tullis* case. It was not raised in that

case. Nor has it ever been either raised or decided in any other case before this court, so far as we are informed.

In the Tullis, Mackey and other cases in this court, and referred to in the brief on the other side and in this brief, the question decided was whether it was competent for State Legislatures to classify railroads by themselves, *for any purposes*, and enact statutes imposing liability on them not imposed on other corporations or on individuals. The court undoubtedly gave the correct answer to this question in *M. P. R'y Co. v. Mackey*, 127 U. S. 205, when it said: "But the hazardous character of the business of *operating a railway* would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employes as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employes, and no objections, therefore, can be made on the ground of its making an unjust discrimination." (Our italics.) Mackey was a locomotive fireman on one engine, and was injured by the negligent movement of another engine by the engineer thereof. Mackey's employment was unquestionably of a "hazardous character" in connection with "operating a railway." Conceding that it is constitutional for State Legislatures to classify some classes of railroad employes and make them the beneficiaries of employers' liability statutes, partial in their operation, we could not conceive of any statute that could be so drawn as to exclude from its benefits an employe injured as Mackey was injured; or as Tullis was injured; or as Montgomery was injured. (See *intra*.)

While the opinion of this court in the Tullis case does not show the character of his employment, it does appear in the report of the case as decided by the United States Circuit Court of Appeals for the Seventh Circuit, 105 Fed. 554, that Tullis was employed as a freight train brakeman, and was injured while so employed, and while riding in the cupola of a caboose, by the negligence of the engineer of a pusher engine, which was to push Tullis'

train over a steep part of the railroad, and which engine so violently collided with the caboose as to throw it from the track, whereby Tullis was injured.

In *P. C. C. & St. L. R'y Co. v. Montgomery*, 152 Ind. 1, in which the construction was given to the Indiana statute which was followed by this court in the Tullis case, Montgomery was a railroad brakeman, and was injured by the negligence of an engineer. No question was made, or could have been made, in that case (any more than in the Tullis case which followed it in construing the Indiana statute, or in the Mackey case construing the Kansas statute), that Montgomery was not engaged in an employment of an extra-hazardous character. He, Tullis and Mackey were all manifestly so engaged, if any railroad employment can be said to be extra-hazardous—more so than any other vocation. Therefore, there was no room in those cases for the question we are raising here. And the question was not raised.

The constitutionality of the Indiana statute in the Montgomery and Tullis cases, and of the Kansas statute in the Mackey case, was challenged *in toto*. The argument was that a State Legislature had no right to enact a statute imposing liability on railroad companies alone as to *any* of their employes. All that this court has decided, as we read the opinions, is that it is competent to provide a right of action in favor of railroad employes who are *exposed to the hazards of operating railroads*, when no similar legislation is enacted in behalf of persons engaged in other than railroad pursuits. But your Honors have never held, as must have been done to support the contention of opposing counsel, that a State Legislature may, without violating the Fourteenth Amendment, provide a right of recovery in behalf of *every* railroad employe, as such, and without reference to whether his occupation is extra-hazardous or whether he is employed in operating a railroad—when no similar remedy is afforded to the employes of any other character of employer, either corporation or individual.

Unless the Indiana statute is construed as embracing only those employes of railroad companies who are en-

gaged in the hazardous branches of the railroad service—who are engaged in *operating* railroads—it plainly contravenes the Fourteenth Amendment. To construe the statute otherwise, and as contended for on behalf of defendant in error, would be to bring within its influence, unjustly and illogically, more than 80% of railroad employes who are not engaged in hazardous occupations, whereas it does not bring within its influence the many thousands of employes engaged in hazardous occupations for employers other than railroads.

The statute as construed and explained in *Pittsburg, etc. R. Co. v. Lightheiser*, 168 Indiana 438; *Bedford Quarries Co. v. Bough*, *Id.* 671; *Indianapolis Traction Co. v. Kinney, etc.*, 171 Ind. 612, 85 N. E. 954; *American Car & Foundry Co. v. Inzer*, 172 Ind. 56, 87 N. E. 722; and in the response to petition for rehearing in *Indianapolis St. R'y Co. v. Kane*, 169 Ind. 40, 81 N. E. 721 (decided since the *Montgomery* and *Tullis* cases), imposes liability upon railroads, and in behalf of their employes, only. Every other employer of labor in Indiana, except a railroad, is protected from liability to employes by the common law defenses of fellow-servants and assumed risks. *Southern Indiana R'y Co. v. Harrell*, 161 Indiana, 689 (R. p. 118); *I. & G. R. Co. v. Foreman*, 162 Indiana 85 (R. p. 129); *New Pittsburg C. & C. Co. v. Peterson*, 136 Indiana, 398 (R. p. 125). There is no statute in that State relating to or affecting the liability of the master to the servant, except the Employers Liability Act we are considering.

Lightheiser was a railroad employe, in a hazardous branch of the railroad service. He was hurt as a result of train operation. The Indiana court held, and properly so, that he came within the statute. *Bough* was employed by a quarry company. The Indiana court held that he did not come within the statute; that it was to be construed as aimed at railroads alone; and that, to justify it as to them, it should be so restricted as to apply only in favor of those railroad employes who were exposed to railroad perils—to the hazards peculiar to the operation of railroads. Unless this is done the statute will unjustly discriminate in favor of employes of railroads whose employments are not attended with extra hazards, and unjustly discriminate against laborers in vocations other

than railroading whose employments are quite as, if not more hazardous than those of more than 80% of railroad employes. We will refer to and comment upon the Kinney and Kane cases later.

From the Twenty-first Annual Report of the Interstate Commerce Commission for 1907 (p. 153), we learn that the reported number of persons on the pay-rolls of the railways in the United States on June 30, 1906, was 1,521,355. Of these employes 59,855 were enginemen, 62,678 firemen, 43,936 conductors, and 119,087 were other trainmen. In other words, 285,556 persons were engaged in the operation of railway trains or engines, while 1,235,799 persons were otherwise employed by the railways of this country. That is to say, those operating railway trains constituted only between 18% and 19%—*less than one-fifth*—of the railway employes of the country.

For the purpose of expressing, relatively, the greatly varying extent of risk which experience has taught is involved in the insurance of persons pursuing different occupations, accident insurance companies have divided occupations into the following classes, each expressing a different degree of risk, beginning with that class which is least hazardous: Select, Preferred, Ordinary, Medium, Special, Hazardous, Extra Hazardous, Special Hazardous, and Extra Special Hazardous. Under this classification, steam railroad employes are divided into 313 classes. (Accident Insurance Manual, pp. 365-371.) Of these 46 are denominated Hazardous, 8 Extra Hazardous, none Special Hazardous, none Extra Special Hazardous, and 7 are specified as being governed by special contracts. Thus but 61 out of 313 classes of steam railroad employes, or approximately 19%, are engaged in work which is deemed hazardous by accident insurance companies; 33 classes, or 10½%, are deemed select risks, this being the highest class. Under the classification above referred to, an accident insurance company unquestionably would not have regarded defendant in error as engaged in a hazardous service.

As we have said, except as modified by the Employers' Liability Statute of Indiana, approved March 4, 1893, (Burns' Annotated Indiana Statutes, Revision of 1901, Secs. 7083-7087, inclusive, pages 604-606; [Record, pages

7 and 8]; Revision of 1908, Secs. 8017-8020, inclusive, Vol. 3, pp. 294 to 297 inclusive), the common law of fellow servants and assumed risks still obtains in that State.

The statute, as enacted, was directed against "all railroads or other corporations, except municipal," operating in Indiana.

The Supreme Court of that State seems to have recognized, from the time the constitutionality of the statute was first challenged in that court, that one of two courses must be pursued: (1) to hold that the statute was too broad, and, following the rule which has often been declared by this court, notably in the *Employers' Liability Cases*, 207 U. S. 463, and the cases cited in that opinion on page 477, and in *Ballard v. Mississippi Cotton Oil Co.*, 81 Miss. 507, 62 L. R. A. 407, refuse to make, by judicial construction, a statute which the legislature had not made—refuse to cut the statute down by construction, so as to bring it within constitutional limits—and declare the statute unconstitutional; or (2) so to limit the operation of the statute, by construction, as to bring it within constitutional bounds. That court adopted the latter course.

In thus cutting down the statute the Legislature had made, and in holding that it applied only to railroads, although the Legislature had made it apply to all corporations, except municipal, the Supreme Court of Indiana realized that the statute could not be constitutionally applied to railroads, merely as such. In other words, the reasoning of the Indiana Court, in the cases cited, is, and our argument is, that it is contrary to the Fourteenth Amendment to the Constitution of the United States for a State Legislature to enact statutes aimed against one class of persons only, and leaving all other classes of persons subject to the more favorable rules of the common law, unless, as was held by this court in *G. C. & S. F. R'y Co. v. Ellis*, 165 U. S. 150, the basis of the attempted classification rests "upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed," and is not made arbitrarily and without such basis.

The defendant in error was not engaged in an extra-hazardous employment. He was not injured in the operation of a railroad. The carpenter's work he was

doing for plaintiff in error was no more hazardous because his employer was a railroad company than it would have been if his employer had been an individual, or a corporation other than a railroad company. Melton was one of a gang of seven laborers, including Shroadess, the foreman, who were erecting a coal tippie or chute. At the time of the accident they were raising, with ordinary pulley, block and tackle, a bent of timber weighing about 1,000 to 1,200 pounds from a partly horizontal to an upright position. The bent fell, as the weight of the testimony shows, by reason of a latent defect in the welding of one of the links of a chain by which one of the pulley blocks was temporarily attached to the frame-work. We think opposing counsel are in error in contending that the defect was patent. Defendant in error was caught by the falling timber and received the injuries for which he brought this action under the Indiana statute, *supra*.

The work which was then being done was such as any carpenter performs in the erection of a house or other structure requiring the use of wooden beams, sills, etc. Defendant in error was exposed to no greater peril in doing that character of work for a railroad company than that to which he would have been exposed had he been assisting in erecting a like structure for a coal mine, or for a coal merchant. There was nothing in the fact that the coal chute was to be used, *after it was completed*, in coaling railroad engines which made it any more dangerous to the workmen who erected the coal chute than if they had been erecting identically or practically the same character of structure for a coal mining company, or individuals operating a coal mine, or for a corporation or an individual engaged in buying and selling coal, and having like structures for that purpose. Yet, it is admitted that if defendant in error had been doing precisely the same work for any employer other than a railroad company, he would not have been entitled to recover either under the statute, or by the common law of Indiana. Can the statute be constitutionally applied as to him, merely because he was employed by a railroad company at the time he received the hurt, when he would be wholly

without remedy if he had been injured while doing the identical work for any character of employer other than a railroad?

The question is well answered in cases hereinafter to be noticed.

Inasmuch as the opinion of the Supreme Court of Indiana in the Bough and other cases on which we rely is rested upon what was decided by this Court in the Ellis, Cotting, Connelly, Kline, Tullis, Mackey, Herrick, Yick Wo and other cases, as well as upon what was decided by the Supreme Courts of Iowa, Minnesota, Kansas and Mississippi, in the cases to which we will direct the Court's attention, it becomes material to ascertain what was decided in those cases.

In the Ellis case, *supra*, the question was as to whether a Texas statute which imposed an obligation on railroad companies to pay attorney's fees in certain cases mentioned in the statute, whereas no similar liability was imposed by the laws of that State on other litigants, was constitutional. This Court held that the statute violated the Fourteenth Amendment, and said:

"While good faith and a knowledge of existing conditions on the part of a Legislature is to be presumed, yet to carry that presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation is to make the protecting clauses of the Fourteenth Amendment a mere rope of sand, in no manner restraining State action.

"It is well settled that corporations are persons within the provisions of the Fourteenth Amendment of the Constitution of the United States (citing many cases). The rights and securities guaranteed to persons by that instrument can not be disregarded in respect to these artificial entities called corporations any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations. A State has no more power to deny to corporations the equal protection of the law than it has to individual citizens.

"But it is said that it is not within the scope of the

Fourteenth Amendment to withhold from States the power of classification, and that if the law deals alike with all of a certain class, it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true (citing many cases), yet it is equally true that such classification can not be made arbitrarily. The State may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

Again, on page 159, the Court said:

"But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews, speaking for this Court, in *Yick Wo v. Hopkins*, 118 U. S. 356, 369: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.' The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty, and the pursuit of happiness.' While such declaration of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and

the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government."

And again, on page 165, the Court said:

"It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection. Tested by these principles, the statute in controversy can not be sustained."

In *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, the Court held that a statute of Kansas violated the Fourteenth Amendment to the Constitution of the United States, in that it applied to the Kansas City Stock Yards Company, but did not apply to other companies or corporations engaged in like business in Kansas. The opinion (at p. 107) quoted approvingly a part of what we have just quoted from the opinion in the *Ellis* case, *supra*; and then (on p. 108) quoted approvingly from the opinion of the Supreme Court of Kansas in *State v. Haun*, 61 Kansas, 146, where a statute of that State, which provided for the payment of the wages of laborers in money, was held unconstitutional on the ground that it contravened the Fourteenth Amendment to the Constitution of the United States; and, on page 109, quoted approvingly from the opinion of the Kansas court in the *Haun* case the following quotation from Cooley's *Constitutional Limitations*, 5th Ed., 484, 486:

"Every one has a right to demand that he be governed by general rules and a special statute which, without his consent, singles his case out as one to be regulated

by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments. Those who make the laws 'are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plow.' This is a maxim in constitutional law, and by it we may test the authority and binding force of legislative enactments."

In *Connelly v. Union Sewer Pipe Company* (184 U. S. 540) the anti-trust statute of Illinois (1893) was held to be unconstitutional because it violated the Fourteenth Amendment to the Constitution of the United States. The statute contained a section exempting from its operation agricultural products or live stock, while in the hands of the producer or raiser.

The Court said:

"The difficulty is not met by saying that, generally speaking, the State when enacting laws may, in its discretion, make a classification of persons, firms, corporations and associations, in order to subserve public objects. For this Court has held that classification (quoting from the *Ellis* case, *supra*) 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. * * * But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. * * * No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable

ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary section.’ ”

In *State v. Loomis*, 115 Mo. 807, which seems to be a leading case on the subject, the Supreme Court of Missouri said:

“The classification for legislative purposes must have some reasonable basis on which to stand. It must be evident that differences which would serve for a classification for some purposes furnish no reason whatever for classification for legislative purposes. The differences which will support class legislation must be such as, in the nature of things, furnish a reasonable basis for separate laws and regulations. Thus the Legislature may fix the age at which persons shall be deemed competent to contract for themselves, but no one can claim that competency to contract can be made to depend on stature or color of the hair. Such a classification for such a purpose would be arbitrary and a piece of legislative despotism, and, therefore, not the law of the land.”

In *Adair v. United States*, 208 U. S. 161, the court held Section 10 of the Act of Congress of June 1, 1898, unconstitutional and void. By that section Congress attempted to make it a misdemeanor against the United States for an interstate carrier employer, or its officer or agent, among other things, to threaten any employe with loss of employment, or unjustly discriminate against any employe, because of his membership in a labor organization. During the course of the opinion of the court it was said:

“It may be observed, in passing, that while that section makes it a crime against the United States to unjustly discriminate against an employe of an interstate carrier because of his being a member of a labor organization, it does not make it a crime to unjustly discriminate against an employe of the carrier because of his not being a member of such organization.”

And again:

"The first inquiry is whether the part of the Tenth Section of the Act of 1898 upon which the first count of the indictment was based is repugnant to the Fifth Amendment of the Constitution, declaring that no person shall be deprived of liberty or property without due process of law. In our opinion, that section in the particular mentioned is an invasion of the personal liberty, as well as of the right of property, guaranteed by that amendment."

The Fourteenth Amendment imposes certainly as great restraint on State action as the Fifth Amendment imposes on Federal action.

And again, it was said in the Adair case:

"We need scarcely repeat what this Court has more than once said—that the power to regulate interstate commerce, great and paramount as that power is, can not be exerted in violation of any fundamental right secured by other provisions of the Constitution. (*Gibbons v. Ogden*, 9 Wheat. 1, 196; *Lottery Case*, 188 U. S. 321, 353.)"

UNLESS THE STATUTE IS LIMITED BY CONSTRUCTION SO AS TO EXCLUDE DEFENDENT IN ERROR FROM ITS OPERATION IT IS UNCONSTITUTIONAL AND VOID.

The earliest of the State statutes which altered the common law rules of fellow-servants and assumed risks was the Iowa statute of 1862, (*Laws*, 1862, p. 198; *Code*, 1872, Sec. 1707), which provided that "Every railroad company shall be liable for all damages sustained by any person, including employes of the company, in consequence of any neglect of the agents, or by any mismanagement of the engineer or other employe of the corporation, to any person sustaining such damage."

In construing that statute the Supreme Court of Iowa, in *Deppe v. The Chicago, R. I. & P. R. Co.*, 36 Iowa, 52, limited the term "employes" to those engaged in operat-

ing the railroad, saying, through Cole, J.: "The manifest purpose of the statute was to give its benefits to employes engaged in the hazardous business of operating railroads. When thus limited it is constitutional; when extended further, it becomes unconstitutional."

Deppe was engaged in shoveling dirt on mud cars, and sometimes went with the train to unload, and at other times remained at the bank to undermine with a pickax. The bank was about 20 feet high from the rock on which he stood to shovel. While shoveling loose dirt, the bank caved in and injured him. It was held he could recover, though the correctness of this holding was subsequently challenged by the same court. (*Malone v. R. Co.*, 61 Iowa, 326.) But the opinion was expressly rested upon the ground that Deppe's employment required him to accompany the mud train to help unload it as well as requiring him to assist in loading the dirt on to the cars; that, therefore, his employment exposed him to the perils and hazards of the business of the railroad; and that although the injuries did not arise from such hazards, they could not be separated from the employment. In the course of the opinion the Iowa court, in speaking of the statute, said:

"But if the statute should be so construed as to apply to all persons in the employment of railroad corporations without regard to the business they were employed in, then it would be a clear case of *class legislation*, and would not apply upon the same terms to all in the same situation, and hence would be unconstitutional, and manifestly so. To illustrate, suppose a railroad company employs several persons to cut the timber on its right of way where it is about to extend its road, and the land owner employs a like number of persons to cut the timber on a strip of equal length alongside such right of way. If one of each set of employes shall be injured by the negligence of a co-employee, and the employe of the railroad company can, under the statute, maintain an action against his employer and the other can not, then it is clear that the law does not apply upon the same terms to all in the same situation. The law, then, would not have

uniform operation, but would be violative of the Constitution just as much as a law that should prescribe under the same circumstances different liabilities for merchants, for mechanics, and for laborers. The manifest purpose of the statute was to give its benefits to employes engaged in the hazardous business of operating railroads. When thus limited it is constitutional; when extended further it becomes unconstitutional. Hence the question is not, as erroneously supposed by the appellee's counsel, whether this plaintiff was, with the boss, a co-employee of the railroad company, but is whether he was engaged in the business to which the statute must be limited."

The Deppe case was thus interpreted on the second appeal of the Malone case, *supra*, 65 Iowa, 422, 21 N. W. 756: "To meet the objection that the Act of 1862 created a rule of liability which was applicable to railroad companies alone, and did not affect other employes under precisely the same circumstances, and that it was, therefore, class legislation, and in violation of the State Constitution, the court, in Deppe's case, construed the act as creating a remedy only in favor of that class of employes who were engaged in the hazardous business of operating railroads."

About the time the Deppe case was decided the Iowa Legislature amended the Act of 1862 so as to read (Code, 1873, Sec. 1307, Code, 1897, Sec. 2071) as follows:

"Every corporation operating a railway shall be liable for all damages sustained by any person, including employes of such corporation, in consequence of the neglect of agents or by any mismanagement of the engineers or other employes of the corporation, and in consequence of the wilful wrongs, whether of commission or omission, of such agents, engineers, or other employes, when such wrongs are in any manner connected with the use and operation of any railway, on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding."

Since the amendment was passed, the Supreme Court of Iowa has been called upon in a large number of cases

to decide whether the plaintiff, at the time of receiving his hurt, was included by, or excluded from the operation of, the statute. We shall briefly notice some of these cases, notwithstanding the argument that may be made that inasmuch as they were decided under a statute which expressly limited recoveries to injuries incident to "the use and operation of any railway" the cases are not authoritative in interpreting a statute like the Indiana statute which does not contain the restrictive words we have last quoted from the Iowa statute as amended. We think such a contention may be thus answered: In amending the Iowa statute the Legislature simply made it conform to the view of the Supreme Court of that State (as declared in the Deppe case, and other cases cited in that opinion), as to what the constitutional limitations of such legislation were. (This view is confirmed by the opinion of the Supreme Court of Indiana in *Indianapolis Traction & Terminal Co. v. Kinney*, by etc., 171 Indiana, 612, 85 N. E. 954, *post.*) The Iowa statute, as thus limited in terms, marks the boundary which the courts have found it necessary to fix in the interpretation and application of statutes of other States, couched in broader terms, in order to hold such statutes constitutional.

Akeson v. C. B. & Q. R. Co., 106 Iowa, 54, 75 N. W. 676, is interesting in this connection. It reviews most of the previous decisions of the Supreme Court of Iowa, construing the Employers' Liability Acts of that State, and clearly marks out the constitutional limitations of such legislation. Akeson was permitted to recover, under the peculiar facts attending his injury. His duties required him to shovel coal from the cars into chutes, to break the coal and wet it for use, and to assist in filling the tenders of locomotive engines with coal. On the day of the accident, a locomotive engine in charge of an engineer and fireman was run up to a coal car whence the coal was supplied, and a bridge was made, and the tender of the locomotive filled by Akeson and his co-employee, Forshay. When the work was finished Forshay remained on the engine tender, as he frequently did, for the purpose of riding on it to the water tank, to get water for the engine, while Akeson returned over the bridge to the coal car. As he was about to step from

the bridge to the car, Forshay picked up a plank and shoved it into the car. The plank caught one of Akeson's feet, and caused him to fall or jump into the car in such manner as to cause a double hernia. During the course of the opinion, affirming a judgment in Akeson's favor, the Iowa court, quoting from the Malone case, *supra*, said:

“To entitle an employe now to recover against the company for injuries which he has sustained in consequence of the negligence or mismanagement or wilfulness of a co-employe, he must show, (1) that he belonged to the class of employes to whom the statute affords a remedy, and (2) that the act which occasioned the injury was of the class of acts for which a remedy is given.”

The court then proceeded:

“Deppe's case may, then, not be deemed controlling in determining what is meant by the use and operation of a railroad. Discrimination has not been made in citing this case in subsequent opinions. It has been referred to as holding that the negligence occasioning the injury need not necessarily be connected with the movement of trains, cars, or machinery on the tracks, without calling attention to the change in the statute. That the employment at the time of the injury must have exposed the complainant to the hazards of railroading, without reference to what he may be required to do at other times, is no longer questioned. *Butler v. Railroad Co.*, 87 Iowa, 206; *Keatley v. Railroad Co.*, 94 Iowa, 685; *Canon v. Railway Co.*, 101 Iowa, 613. It may be well to say, however, that the statutes of Minnesota and Kansas are like that construed in Deppe's case. See *Lavallee v. Railway Co.*, 40 Minn., 249, 41 N. W. 974; *Railroad Co. v. Pontius*, 52 Kansas, 264, 34 Pac. 739. In *Johnson v. Railway Co.*, 43 Minn., 222, 45 N. W. 156, the Supreme Court of Minnesota, after mature consideration, held that the statute ‘only applies to those employes who are exposed to the peculiar hazards incident to the use and operation of railroads, and whose injuries are the result of such dangers.’ With one exception, recovery has not been per-

mitted in any case in this State other than Deppe's, where the wrongful act causing the injury was not occasioned by the actual movement of trains, cars, or machinery on the track (citing cases). On the other hand, there are numerous cases holding that, although the complainant was engaged in work on a railroad, he may not recover. In *Potter v. Railway Co.*, 46 Iowa, 399, a person injured while moving an engine driver in the shop was held not to have been injured in the operation of the road. In *Smith v. Railroad Co.*, 59 Iowa, 73, the plaintiff was not entitled to recover when injured while engaged in loading a car on the track with timber. To the same effect, see *Schroeder v. Railway Co.*, 41 Iowa, 344. In the same case reported in 47 Iowa, 375, it appeared the plaintiff was injured by the movement of cars, and he was permitted to recover. In *Malone v. Railway Co.*, *supra*, it was held that assisting in closing the door of the roundhouse after the engine had entered, was not included in operating a road. In *Luce v. Railway Co.*, 67 Iowa, 75, the plaintiff, in hoisting coal for the purpose of filling a car by means of a crane, was not engaged in the operation of the road. In *Stroble v. Railway Co.*, 70 Iowa, 560, the court, speaking through Beck, J., said: 'This negligence, to render a corporation liable, must be of an employe, and affect a co-employe, who are in some manner performing work for the purpose of moving a train, as loading or unloading it, superintending, directing, or aiding its movement. The persons must be connected in some manner with the moving of trains. Work preparatory thereto, which may be done away from a train, is not connected with its movement. The statute, it will be observed, holds the corporation liable for the negligence of a co-employe which is "in any manner connected with the use and operation of any railway." What is the use and operation of a railway? It is constructed for the sole purpose of the movement of trains. That is its sole use. What is the operation of a railway? They can be operated in no other way than by the movements of trains.' The first three sentences were quoted with approval in *Butler v. Railroad Co.*, *supra*, as holding that the party injured must be exposed to the hazards of railroading. Rothrock, J., in *Pyne v. Railway Co.*, 54 Iowa, 223, said: 'We think

the proper test in determining the question is: Does the duty of the employe require him to perform services which expose him to hazards peculiar to the business of using and operating a railroad? If it does, and while in the line of his duty, he, by the negligence of a co-employe, receives an injury from a passing train or from other appliances used in the use and operation of the road, he may recover.' In *Foley v. Railway Co.*, 64 Iowa, 644, the same judge used this language: 'With the exception of *Deppe's* case, all the actions in which this court has determined that railroad companies are liable in this class of cases are those where the injury was received by the movement of cars or engines upon the track.' In *Larson v. Railway Co.*, 91 Iowa, 81, the court, through *Given, J.*, said that 'an examination of the cases preceding that of *Stroble* will show that in none of them was it held that the use and operation of a railroad were limited to the movement of what are commonly known as "trains." The cases are all grounded upon the view that the statute applies when the employment and the wrong are connected with the handling of railroad machinery moved upon railroad tracks.' In that case the injury was occasioned by the moving of a hand car. See *Railroad Co. v. Artery*, 137 U. S. 507. In *Nelson v. Railway Co.*, *supra*, the plaintiff was injured while operating a ditching machine on a railroad. The use and operation of a railroad does not consist in the movement of trains alone. It is within the statute if the injury is occasioned, as said in *Larson's* case, "in handling the railroad machinery moved upon a railroad track." In *Butler's* case it is said by *Kinne, J.*, after reviewing many previous decisions: 'In the cases heretofore cited, it has repeatedly been held that this statute was intended for the protection and benefit of employes, who, from the very nature of their employment, are exposed to the hazards peculiar to the business of using and operating a railroad.' The only dangers peculiar to railroading are those occasioned by the movement of engines, cars, and machinery on the track, or directly connected therewith. It is evident that the statute contemplates such injuries only as are caused by the negligent acts of employes so engaged. In no other proper sense is a railroad used and operated * * *.

"The peculiarity of the railroad business, which distinguishes it from any other, is the movement of vehicles or machinery of great weight on the track by steam or other power, and the dangers incident to such movement are those the statute was intended to guard against. If, then, the injury is received by an employe whose work exposes him to the hazards of moving trains, cars, engines, or machinery on the track, and is caused by the negligence of a co-employe in the actual movement thereof, or in any manner directly connected therewith, the statute applies, and recovery may be had. Beyond this, the statute affords no protection. *The purpose of the lawmakers was evidently not to make men, because employed by railroad companies, favorites of the law, but to afford protection owing to the peculiar hazards of their situation.*" * * *

The Iowa statute was before this Court in Minneapolis, etc., R'y Co. v. Herrick (127 U. S. 210), decided about the same time that the Mackey case was decided; and the court upheld the constitutionality of the statute in that case; just as the Supreme Court of Iowa had done. But Herrick was a freight brakeman and was injured while coupling an engine to a freight car, through the negligence of the engineer. Herrick was clearly performing a service which exposed him to the hazards peculiar to railroad operation when he was injured, and by the negligent operation of an engine incident to train operation. Hence, there is no sort of conflict between the opinion of the court in the Herrick case and that for which we are contending in this one.

In Luce v. R. Co. (67 Iowa, 75, 24 N. W. 600), the plaintiff was employed in a coal house of a railroad company, and, while hoisting coal for the purpose of coal-ing an engine was struck by the crane by which the coal was hoisted, due to the negligence of a co-servant. It was held that the statute did not apply, the court saying:

"The danger arising from the use of the crane does not appear to have been greater or less by reason of the fact that it was used in loading a railroad car. Nor does

it appear that the plaintiff, while engaged in his duties, was exposed to any danger from the operation of the road."

In *Foley v. R. Co.* (64 Iowa, 644, 21 N. W. 124), a recovery was denied to a car repairer for injuries he received while repairing a car on a side track, by reason of the alleged negligence of a co-employee in failing to block the wheels of the car. The court declared that with the single exception of *Deppe v. R. Co.* (36 Iowa, 52), in which a recovery was allowed to an employee injured while shoveling earth into flat cars, by the caving in of a bank of earth, the only cases in which the court had held railroad companies liable under the statute were those where the injury was received by the movements of cars or engines upon tracks.

In *Stroble v. R. Co.* (70 Iowa 555, 31 N. W. 63), the same court denied a recovery to an employe of a railroad company who was injured by the giving way of certain steps leading up to a platform for loading coal. The court said that the evidence failed to show that the plaintiff and any co-employee whose duty could have required him to keep the steps in repair had anything to do with the use and operation of the railroad, and further said:

"The coal house and stairs were a part of the contrivances for placing fuel within easy reach of defendant's locomotives, and employes charged with any duty pertaining thereto had no connection with the use and operation of the railroad which is contemplated by the statute. It is true, there is a remote connection, as there is in the case of a coal miner or teamster who hauls the coal—all being employed in work which in the end will supply the coal to the locomotive; but this is not the connection contemplated by the statute. This negligence, to render the corporation liable, must be of an employe, and affect a co-employe, who are in some manner performing work for the purpose of moving a train, as loading or unloading it, superintending, directing or aiding its movement. The persons must be connected in some

manner with the moving trains. Work preparatory thereto, which may be done away from a train, is not connected with its movement."

In *Malone v. R. Co.* (65 Iowa, 417, N. W. 756), it was held that an employe of a railroad company, employed in wiping off engines, opening and closing the doors of the engine-house, removing snow from the turntable and tracks, and turning the turntable when engines were being run between the main track and the engine-house, was not engaged in the operation of the railroad, within the statute, and was not entitled to recover for an injury caused by the negligence of a fellow-servant while attempting to open the doors of the engine-house.

In *Reddington v. R. Co.* (108 Iowa, 96, 78 N. W. 800), it was held that the railroad was not liable to a brakeman for injuries received while he was assisting in coal-ing an engine, through the negligence of a co-employe in operating the hoisting crane so as to knock him from the platform—such movement not being necessary in order to permit the train to start. The *Reddington* case was decided in 1899—about 37 years after the Employer's Liability Statute of Iowa was first enacted, and after the Supreme Court of that State had construed that statute as originally enacted and as re-enacted in a great many cases, a number of which were reviewed in the opinion in the *Reddington* case.

In *Dunn v. C. R. I. & P. R. Co.*, 130 Iowa, 580, 107 N. W. 616, recovery was denied for fatal injury to a section hand by being struck by an iron bar thrown by a passing train. The Iowa court, while holding that deceased clearly was exposed to peculiar hazards incident to the use and operation of railroads, and was within the protection of the statute, and while conceding that by the negligence of a co-employe, Dunn was struck by a missile set in motion by a moving train, held that such injury gave rise to no right of action, because the work in which the negligent co-employe was engaged was not connected in some manner with the movement of the train by which the injury was done.

If *Stroble*, *Luce*, *Foley*, *Malone*, *Potter*, *Smith*, *Dunn*,

and Reddington were not entitled to recover under the Iowa statute, surely defendant in error, in the case at bar, is not entitled to recover under the Indiana statute, which this court, in effect, held in *Tullis v. L. E. & W. R. Co.*, 175 U. S. 348, *supra*, was substantially similar to the Iowa statute, and to the Minnesota and Kansas statutes hereafter to be noticed. The Indiana court, in the *Lightheiser*, *Bough*, and *Kinney* cases, *infra*, held the same way. In the Iowa cases mentioned, the injured employes were engaged in work very much more nearly incident to the operation of a railroad than was defendant in error in the case at bar.

The Employers' Liability Act of Minnesota (Ch. 13, Gen. Laws, 1887), declares:

"Every railroad corporation owning or operating a railroad in this State shall be liable for all damages sustained by any agent or servant thereof, by reason of the negligence of any other agent or servant thereof, without contributory negligence on his part, when sustained within this State; and no contract, rule, or regulation between such corporation and any agent or servant shall impair or diminish such liability: *Provided*, That nothing in this act shall be so construed as to render any railroad company liable for damages sustained by any employe, agent, or servant while engaged in the construction of a new road or any part thereof not open to public travel or use."

The Supreme Court of Minnesota has construed the statute as applying only to those employes who are engaged in the *operation* of railroads.

In *Lavallee v. R. Co.* (40 Minn. 249, 41 N. W. 974), the opinion by Chief Justice Gilfillan does not show the precise nature of *Lavallee's* employment. The opinion does say, however, that he and the persons through whose negligence he received the injury from which he died, were fellow-servants. The court, after stating that the question for decision was whether the statute includes all employes, agents and servants of a railroad corporation, without regard to the character of the business in which

they were employed, declared that, while taken literally, the statute did so, it was evident that the statute could not be taken literally. After referring to the decisions of the courts of last resort of some of the other States which had enacted similar statutes, including *McAunich v. R. Co.*, 20 Iowa, 338, and *Deppe v. R. Co.*, 36 Iowa, 52, and quoting approvingly from *Railroad Co. v. Mackey*, 127 U. S. 205, where the character of the employe injured was such that no question could be made that he came within the provisions of the Kansas statute, if it was to be given any effect whatever, and after discussing the power of Legislatures to classify subjects of legislation, the court said respecting the Minnesota statute:

“Applying this test, it is impossible to avoid the conclusion that the statute, if construed as appellant claims it ought to be, would be class legislation, not applying upon the same terms to all in the same situation, nor having any apparent natural reason for any distinction.

“The frequency and magnitude of the dangers to which those employed in operating railroads are exposed; the difficulty, sometimes impossibility, of escaping from them with any amount of care, when they come; the fact that a great number of men are employed, co-operating in the same work, so that no one of them can know all the others, their competency, skill, and care, so that he may be said to voluntarily assume the risk arising from the want of skill or care by any one of the number—are a sufficient reason for applying a rule of liability on the part of the employer to the employe so employed different from that ordinarily applied between master and servant. But no just reason can be suggested why such difference should be founded, not on the character of the employment, nor of the danger to which those employed are exposed, but on the character only of the employer. We can see why the employer’s liability should be greater when the business is that of operating a railroad, but can not see why one individual or corporation should be held to a rule of liability different from that applied to another, when the employment and its hazards are precisely the same. We can not illustrate this better than

by using an illustration employed by the Supreme Court of Iowa in *Deppe v. R. Co.* (36 Iowa, 52): 'Suppose a railroad company employ several persons to cut the timber on its right of way where it is about to extend its road, and the landowner employs a like number of persons to cut the timber on a strip of equal length alongside such right of way. If one of each set of employes shall be injured by the negligence of a co-employee, and the railroad employee can, under the statute, maintain an action against his employer and the other can not, then it is clear that the law does not apply upon the same terms to all in the same situation.' "

And the court held that the statute was to be confined in its operation to cases of employes engaged in *operating* a railroad, and necessarily exposed to the hazards attending that business; that the statute did not embrace all employes of a railroad company, without regard to the kind of work in which they are engaged; and that there could be no recovery for Lavallee's death.

In *Johnson v. R. Co.* (43 Minn. 222; 45 N. W. 156, 8 L. R. A. 419), a crew of men, of whom the plaintiff was one, were engaged in repairing a bridge on defendant's railroad. In performing the work it was necessary to leave a draw partly open. Through the negligence of one of the crew the draw was left unfastened, was blown partly shut by the wind, and injured plaintiff while he was at work between the stationary part of the bridge and the draw. It was held that the statute did not apply and that the railroad company was not liable to Johnson. The opinion of the court referred to what had been held in the Lavallee case, to the effect that the statute only applied to the peculiar hazards due to the use and operation of railroads, and must be construed as though designed exclusively for the benefit of those whose employments expose them to such hazards, and whose injuries are caused by them, and said:

"And the more we consider the question the more we are confirmed in the opinion that it is only when construed as subject to some such limitation that the statute can be sustained as a valid law. As was said in the case

referred to, to avoid the imputation of 'class legislation,' the classification, in cases of special legislation, must be made upon some apparent, natural reason—some reason suggested by necessity, by such a difference in the situation and circumstances of the subjects placed in different classes as suggests the necessity or propriety of different legislation with respect to them. If a distinction is to be made as to the liability of employers to their employes, it must be based upon a difference in the nature of the employment, and not of the employers. One rule of liability can not be established for railway companies, merely as such, and another rule for other employers, under like circumstances and conditions. * * * Neither would it relieve the act from the imputation of class legislation that it applies alike to all railroads. It has been sometimes loosely stated that special legislation is not class, 'if all persons brought under its influence are treated alike under the same conditions.' But this is only half the truth. Not only must it treat alike, under the same conditions, all who are brought 'within its influence,' but in its classification it must bring within its influence all who are under the same conditions. Therefore, if a distinction is to be made between railway corporations and other employers as respects their liability to their employes, it must be based upon some difference in the nature of the employment, and can only extend to cases where such difference exists. Hence most courts, as notably in Iowa and Kansas, have held that similar statutes, although general in their terms, embrace only 'the peculiar hazards of railroading.' * * *

"Therefore, after mature consideration, our conclusion is that, if any limitation is to be placed by the courts upon the application of this statute (and on constitutional grounds there must be), the only one which will furnish any definite or logical rule is to hold that it only applies to those employes who are exposed to the peculiar hazards incident to the use and operation of railroads, and whose injuries are the result of such dangers. * * * Applying the test suggested, it is clear that plaintiff's case is not within the provisions of the act. * * * As suggested by counsel for defendant, sup-

pose there had been a wagon bridge over the St. Louis River, alongside of this railroad bridge and one of the crew engaged in repairing it had been injured under like circumstances. He could not have recovered from his employer. Yet the actual situation, both as to the nature of the employment and the cause of the injury, would have been the same in either case."

In *Jemming v. R. Co.*, 96 Minn. 302, 104 N. W. 1079, the plaintiff was injured while employed by the railroad company as a pitman. He was one of a crew of nine men, consisting of an engineer, a craneman, a fireman, two jackmen and four pitmen, who were operating a steam shovel in a gravel pit operated by the railroad company. Jemming was injured by the negligent manner in which the engineer caused the bucket to swing from the ballast car into the pit. He sought to recover under the Minnesota statute. But it was held that the statute did not apply, for the reason that plaintiff and the fellow-servants by whose negligence he was injured were not engaged in operating a railroad at the time of the accident. The court also denied Jemming a right to recover on common law principles for the reason that he and those whose negligence caused his injury were fellow-servants.

After quoting approvingly from the *Lavallee* and *Johnson* cases the court said of them.

"The rule, as thus established, that the statute includes only the class of servants exposed to injury by the dangers peculiar to the use and operation of railroads, has never since been departed from by this court" (citing many cases).

The Minnesota statute was before this court in *Minnesota Iron Co. v. Kline* (199 U. S. 593). In that case the Supreme Court of Minnesota adjudged that *Kline* came within the operation of the statute. In the opinion of this court reference was made to the fact that the Minnesota court had held that the statute was confined to the dangers peculiar to railroads, and did not discriminate against railroad companies merely as such, and it was held that, inasmuch as the statute, as

thus interpreted, was not within the prohibition of the Fourteenth Amendment the Court would not interfere with the construction put upon the statute by the Supreme Court of Minnesota, the court saying:

"Of course there is no objection to legislation being confined to a peculiar and well-defined class of perils."

In *M. K. & T. R. Co. v. Medaris* (60 Kan. 151, 55 Pac. 875), which was brought under the fellow-servant statute of Kansas, 1874 (Laws 1874, Ch. 93, Sec. 1), and which statute is quoted, 127 U. S., on p. 206, *ante*, the Supreme Court of Kansas held that the statute did not apply. Medaris was employed in setting a curbing around an office building and depot of the railroad company at Parsons, Kansas. The curbstones had been prepared elsewhere, shipped to Parsons and unloaded near the building around which they were to be placed. The men employed to set the curbing dug a ditch, and several of the curbstones were brought up and left on the side of the ditch, ready to be placed. While setting a curbstone, another one, which had been left standing unsupported on the edge of the ditch, was upset and fell upon one of Medaris' legs, causing a permanent injury. In reversing a judgment he obtained in the trial court, the Supreme Court of Kansas held that whether he was entitled to the benefit of the statute depended upon the character of the work in which he was engaged, and not on the mere fact that he was an employe of a railroad company; that the validity of the law had been sustained as against the charge that it was class legislation, on the ground that the hazardous character of the business of operating a railroad justified the passage of a law for the protection of those engaged in that service. The court then said:

"The rule of liability applied under the statute is different from that which ordinarily applies between master and servant; but this difference is founded on the hazardous character of the service and is not intended as a discrimination between employers. The statute would certainly be open to objection if a different rule of liabil-

ity was applied to a railroad company than is applied to other employers under like circumstances and conditions. The hazards incident to the use and operation of railroads, is a natural and reasonable classification, which justifies the exceptional legislation; for if the statute was not given that interpretation, and limited in its operation to the protection of those engaged in the hazardous service, it could not be upheld."

The court further said:

"He can only recover by showing that the service in which he was engaged exposed him to the peculiar perils incident to the operation of a railroad. * * * The work in which he was engaged involved no more risk or hazard than it would if the same work was being done for an individual at the same time and place. The benefits of the act can no more be claimed by him than they could by the carpenter who laid the floor in the office building or nailed the shingles on its roof."

The court cited the Lavalley, Johnson, Deppe and Stroble cases, *supra*; quoted approvingly from the former; and then, reaffirming what was held in *R'y Co. v. Haley* (25 Kan. 53), that it was difficult to see how the validity of the law can be sustained unless it is interpreted to 'embrace only those persons more or less exposed to the hazards of the business of railroading,' declared that Medaris was not engaged in that kind of service when injured, and that there was no liability to him under the statute.

The Kansas statute was before this court in *Missouri Pacific R'y Co. v. Mackey*, *supra* (127 U. S. 205). Mackey was a locomotive fireman on one of the engines of the railroad company. He was injured in a negligent collision, caused by the engineer of another engine. If the statute was to be given any effect whatever it was bound to be applied in favor of Mackey. He was unquestionably engaged in a hazardous branch of the railroad service. This court, construing the statute in the light of the facts in that case, held that the statute did not

violate the Fourteenth Amendment to the Constitution of the United States. Among other things, the court said:

"But the hazardous character of the business of operating a railroad would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employes, as well as the safety of the public."

The statute was again before this court in *Railroad Company v. Pontius* (154 U. S. 209), and the Court met the argument that Pontius, a bridge builder, was not entitled to the benefits of the statute because it only applied to employes exposed to hazards peculiarly incident to the use and operation of railroads, by saying:

"He was engaged at the time the accident occurred not in building a bridge, but in loading timbers on a car for transportation over the line of defendant's road."

The clear implication was that if Pontius had been working as a bridge builder the statute would not have been applied in his favor. If it would not, then *a fortiori* such a statute should not be applied in favor of a carpenter who was doing work much less hazardous than that of a railroad bridge builder—in favor of one whose work was the simplest kind of carpenter's work.

The distinction was well drawn by Mr. Justice Brewer, in an opinion written by him as a member of the United States Circuit Court of Appeals for the Eighth Circuit, in *C. R. I. & P. R. Co. v. Stahley*, 62 Fed. 363, in which the Kansas statute, which the court held in the *Tullis* case was practically the same as the Indiana statute, was held to apply to a workman in a roundhouse, who was injured while getting a locomotive ready for immediate use. Judge Brewer said:

"He was not engaged in repairing an old engine or constructing a new one, but in putting that engine, which had recently arrived, in condition for immediate use. He was * * * not engaged in any outside work remotely

related to the business of the company; he was not cutting ties on some distant tract to be used by the company in preparing its roadbed, nor in mining coal for consumption by the engines, nor even in the machine shops of the company, constructing or repairing its rolling stock; but the work which he was doing was work directly related to the movement of trains—as much so as that of repairing the track.”

The work which defendant in error was doing in assisting in erecting the coal tipple certainly did not directly relate to the movement of trains. If it could be called railroad work at all, it was merely outside work, remotely related to the railroad business—as much so as cutting ties, mining coal for consumption, constructing or repairing rolling stock in a machine shop, as stated by Judge Brewer, and not, therefore, a character of work embraced by the statute.

In *Givens v. So. R'y Co.* in Miss., 49 So. Rep. 180, where a section hand was injured while returning from work on a push car, by being struck by a lever car closely following it, while attempting to carry out the orders of a superior servant to dismount from and attempt to stop the push-car, the Supreme Court of Mississippi held that *Givens* did not come within the provisions of Section 193 of the Mississippi Constitution of 1890, and therefore was not entitled to recover. The court held that the only reason why Section 193 could be upheld as constitutional, and as not contravening the Fourteenth Amendment as interpreted by this court, was upon the ground that railroads might be classified because of the fact of the inherent danger attending their operation, and that railroad employes can only recover where they are injured by reason of perils attending the operation of railroads. The court held as a matter of law that a section hand injured in hand car operation was not exposed to perils which were peculiarly incident to railroad operation, and therefore could not be constitutionally held to be embraced by Section 193 of the Mississippi Constitution.

See, also, *Ballard v. Mississippi Cotton Oil Co.*, 81 Miss. 507, *supra*.

**THE INDIANA STATUTE AND DECISIONS
CONSTRUING IT**

On March 4, 1893, the Legislature of Indiana enacted an Employers' Liability statute, which is to be found in Burns' Annotated Indiana Statutes, Revision of 1901, Sections 7083-7087, inclusive, Revision of 1908, Secs. 8017-8020, inclusive, Vol. 3, pp. 294 to 297, inclusive (where many cases are cited). That statute provides, "That every railroad or other corporation, except municipal, operating in this State, shall be liable for damages for personal injury suffered by any employe while in its service in the following cases." Then follow descriptions of the four states of case in which the employer shall be liable. (R. pp. 7, 8.) The effect of the statute is to abolish the doctrines of assumed risk and fellow-servants as against the employers and in favor of the employes named in the statute.

In *I. U. Ry. Co. v. Houlihan*, 157 Indiana, 494, 60 N. E. 943, the court held that the statute applied to a telegraph operator stationed at a track junction, and whose duties required him to cross the railroad tracks, and who, while so doing, was struck by a train running 20 miles an hour but which gave no warning of its approach. In answer to the argument made by counsel for the railroad that the subdivision of the statute under which the action was brought was in conflict with the equality clause of the Federal and State Constitutions, the court, after briefly indicating the points made by counsel, answered, "It is competent for the Legislature, in the exercise of the police power, to take steps for the protection of the lives and limbs of all persons who may be exposed to dangerous agencies in the hands of others. The powerful forces in railroading, that are under the direction and control of those in charge of 'any signal telegraph office, switch yard, shop, round-house, locomotive engine or train upon a railway,' were proper to be selected as sources of unusual danger which should be guarded against. * * * The Legislature evidently attempted to protect all persons who are not already protected from

the negligent use of particular instrumentalities. The classification is made on the basis of the peculiar hazards in railroading."

The injury sued for in the case at bar did not grow out of any omission of duty imposed by that part of the statute involved in the decision of the Houlihan case.

In *Railroad Co. v. Lightheiser*, 168 Ind. 438, 78 N. E. 1033, the plaintiff was a passenger train engineer, and was standing between two railroad tracks where he had gone to take charge of his own engine, when he was knocked down and injured by another train of the railroad company, in the City of Logansport, Indiana. It was held that the statute applied. In answer to the contention of the railroad company that the statute violated the Fourteenth Amendment to the Constitution of the United States, and referring to *Railroad Company v. Montgomery*, 152 Ind. 1, where it was held that the statute was capable of severance, and thus, by putting railroads in a class by themselves, it might be sustained as to railroads, regardless of its unconstitutionality as to other corporations, the court said:

"The classification of railroads by themselves was held proper in the cases above cited, on account of the dangerous and hazardous character of the business of operating the railroads. This classification is based, not upon a difference in the nature of the employment. (*Indianapolis, etc., Ry. Co. v. Houlihan*, 157 Ind. 494, 501, 60 N. E. 943, 54 L. R. A. 787.) * * * Under the decisions cited, the character of the employers is not a controlling factor. The statute is to be given at least a reasonable interpretation, one that will carry into effect the legislative intent. * * * As we have shown, the basis of the classification of railroads by themselves was the hazardous and dangerous character of the employment of operating railroads, and this does not depend upon whether railroads are operated by corporations or by one or more persons. * * * The spirit and purpose of the statute must be looked to in interpreting the statute in controversy. As we have seen, the spirit and purpose of said Employers' Liability Act, so far as railroads are concerned, was

the protection of employes engaged in the dangerous and hazardous work of operating railroads in this State, and we hold that it applies to every corporation, company, co-partnership, or person engaged in the dangerous and hazardous business of operating a railroad and their employes who are engaged in such dangerous and hazardous work."

In *So. Ind. Ry. Co. v. Harrell*, 161 Indiana, 262, 68 N. E. 262, the railway company was engaged in the construction of a railroad bridge over White River. A heavy stone was being lifted by a derrick. Three of Harrell's co-laborers were holding the stone away from the railroad track by means of a rope, after the stone was raised above the course on which it rested. Two of the men let go the rope, and the third, being unable to hold the stone by himself, also abandoned the rope and sought a place of safety. The boom then swung around, and the chain which held the suspended stone caught on the running board of the pile driver. This caused the stone to swing east, and as it swung back it struck appellee, crushing one of his feet, and injuring the other. He sought a recovery under the Indiana statute, but the Supreme Court of that State held that as to him the statute was no broader than the common law, and that he was not entitled to recover either by virtue of the statute or the common law.

In *I. & G. R. Co. v. Foreman*, 162 Indiana, 85, 69 N. E. 669, the plaintiff, an employe of the railroad company, engaged in the construction of a track, was injured while being transported to his home in the work car of the company, by reason of the negligence of the employes of another train, whereby there was a collision between that train and the work train. The court denied Foreman a right to recover, either under the Indiana statute or at common law, for the reason that he was injured by the negligence of a fellow servant.

In *Bedford Quarries Co. v. Bough*, 168 Ind. 671, 80 N. E. 520, the court held that the statute, in so far as it applied to corporations other than railroad companies, violated the Fourteenth Amendment to the Constitution of the United States, as imposing on corporate employers

burdens not imposed on individuals and partnerships. Bough was an employe of a quarry company, and was embraced by the terms of the statute. During the course of the opinion the court used this language:

“It is urged by appellant that said Employers’ Liability Act, except as applied to railroads, is in violation of the Fourteenth Amendment of the Constitution of the United States, and therefore void, for the reason that it imposes burdens upon private corporation employers that are not imposed on individual and co-partnership employers in the same business and under the same circumstances and conditions, and gives a right of action to the employes of private corporations that is not granted to the employes of individuals and co-partnerships under like conditions.

“Appellee insists that the legislature has the power of classification for legislative purposes, and that the classification in said act was proper. The legislature may make a classification for legislative purposes, but it must have some reasonable basis upon which to stand. It is evident that differences which would serve for a classification for some purposes would furnish no reason for a classification for legislative purposes. Such legislation must not only operate equally upon all within the class, but the classification must furnish a reason for and justify the making of the class, that is, the reason for the classification must inhere in the subject matter, and rest upon some reason which is natural and substantial, and not artificial. Not only must the classification treat all brought under its influence alike, under the same conditions, but it must embrace all within the class to which it is naturally related. Neither mere isolation nor arbitrary selection is proper classification.”

And again:

“While the Employers’ Liability Act, so far as it affects private corporations, applies to all within the class named therein, it does not include all of the class to which it is naturally related. Employes of individuals

and co-partnerships are excluded from the benefit of its provisions. It gives a right of action to an employe for injuries received while in the service of a private corporation in certain cases, but denies the employe of an individual or co-partnership, engaged in the same business, a right of action for an injury arising from the same cause and under the same conditions. It imposes new burdens on private corporations, while natural persons carrying on a like business and under like circumstances and conditions are left without any such burden. The right of action is made to depend upon the character of the employer, and not upon the character of the employment."

The opinion goes on to quote from *Ballard v. Mississippi, etc., Oil Co.*, 81 Miss. 507, 34 So. 533, 95 Am. St Rep. 476, 62 L. R. A. 407, which decided that a similar statute of Mississippi was unconstitutional; quotes the Minnesota statute, and from the *Lavallee, Johnson, Kline and Jemming* cases, *supra*; the Iowa statute, and from the *Akeson* and other Iowa cases, *supra*; the *Lightheiser* case, and *Tullis v. L. E. & W. R. Co.*, 175 U. S. 348; *Connelly v. Union Sewer Pipe Co.*, 184 U. S. 540, *Yick Wo v. Hopkins*, 118 U. S. 356; *Gulf C. & S. F. Ry. Co. v. Ellis*, 165 U. S. 150, and other cases, and then uses this language:

"In view of this, everyone must realize that there is a reasonable ground for the essential idea of the employers' liability legislation; but the fact must not be forgotten that the small industry still exists, and that, under the convenient form of corporate capacity men still carry on industrial undertakings which are in no essential particular different from those which are carried on by co-partnerships and individuals. It is this fact which makes a classification on the basis of the character of the employer inherently vicious. True, the corporation, under our laws and industrial system, has in it the seeds of tremendous growth; but, as the real evil can be reached by a classification which goes to those elements which, to some extent, have removed the reason for the co-servant rule, there is not even a color of an

excuse for imposing burdens on the corporate employer, while its competitor, a natural person, who is carrying on a like business under the same conditions, is left without any such burden. If said corporations, as such, are to have legislative burdens put upon them, as by the law in controversy, then all who ought to be put in their class should be included, or, if this appears to the legislative mind as improper, owing to differences in the character of the employment, then legislation should have for its basis a classification which rests on such differences in the various employments as would make a distinction between them appear to be warranted."

In *Indianapolis Traction & Terminal Co. v. Kinney*, by etc., 171 Ind. 612, 85 N. E. 954 (decided October 27, 1908), the Supreme Court of Indiana, for the first time after it had, by construction, cut down the statute so as to apply to railroads alone, was called upon to expressly decide whether the statute applied to all employes of railroad employers or only applied to those engaged in the extra hazardous branches of the railroad service. Kinney and five others were employed to do service as common laborers, as a gang, in repairing and constructing tracks for the defendant street railroad company. The gang was taken by Wilson, the foreman, to a flat car standing on a siding, to unload some steel rails. Kinney was ordered by Wilson to bring an implement from the tool car. In Kinney's absence Wilson superintended the placing of some skids on the side of the flat car, down which to slide the rails, and as Kinney returned from the errand on which Wilson had sent him and as Kinney approached the car, Wilson ordered him to step up and, with the implement he had, turn the rails off the car on to the skids. In obedience to the order, Kinney turned a rail off. As the rail dropped on to the skids one of the latter slipped off the car and caused the rail to drop upon and injure Kinney. In an action under the Indiana Employers' Liability Statute to recover damages for his injuries so received (the same statute under which Melton, the defendant in error in the case at bar, brought this

action) Kinney alleged that he was injured by the negligence of his foreman, Wilson, and of the railroad company.

Kinney recovered in the lower court. The Supreme Court reversed the judgment, holding that Kinney was not embraced by the statute, and during the course of the opinion used this language:

"The complaint and instruction each presents the same question, and assumes that the Employers' Liability Act applies to the facts stated. Is appellee correct in this assumption?

"Appellant, in maintaining the negative, contends that the statute referred to contravenes the Fourteenth Amendment to the Federal Constitution, in that it denies to the appellant the equal protection of the law in its capacity as an employer. This question received the consideration of the court in Pittsburgh, etc., R. Co. v. Montgomery (1898), 152 Ind. 1, 69 L. R. A. 875, 71 Am. St. 300, and has been before the court in a number of cases since (Pittsburgh, etc., R. Co. v. Hosea [1899], 152 Ind. 412; Pittsburgh, etc., R. Co. v. Lightheiser [1907], 168 Ind. 438; Bedford Quarries Co. v. Bough [1907], 168 Ind. 671, 14 L. R. A. [N. S.] 418); but in no subsequent case has any reason been suggested to impair our confidence in the rule on this point, as laid down in Pittsburgh, etc., R. Co. v. Montgomery, *supra*, and, being satisfied therewith, we deem it unprofitable to repeat the reasons for such holding.

"It has always been held in this State that Section 23 of the Bill of Rights, in spirit and meaning, did not forbid the making of such classification of subjects for legislative purposes as are demanded by reasons of economy, convenience and the best interests of the public, and it is found that any such classification can be made as will treat all alike and bring within its influence all who are under the same conditions. To illustrate: It would be found burdensome, wasteful and even impracticable for

our cities of the smaller class to be compelled to maintain the expensive municipal machinery found necessary to the successful government of our larger cities.

"The constitutionality of the employers' liability act is upheld on the ground that the inclusion of railroads only is a proper classification, because it relates to the peculiar hazards inherent in the use and operation of railroads, and refers to the character of the employment and not to the employer. *Pittsburgh, etc., R. Co. v. Lighthouse, supra*; *Bedford Quarries Co. v. Bough, supra*; *Johnson v. St. Paul, etc., R. Co.* (1890), 43 Minn. 222, 45 N. W. 156, 8 L. R. A. 419; *Missouri Pac. R. Co. v. Haley* (1881), 25 Kan. 35; *Potter v. Chicago, etc., R. Co.* (1877), 46 Iowa 399.

"*The peculiar and superlative dangers to which employes are necessarily exposed in the running of trains form the basis of such classification, and it is not, therefore, material whether the employer in railroad service is a corporation, partnership or an individual. The liability is the same in one case as in the other. Pittsburgh, etc., R. Co. v. Lighthouse, supra.*

"*To separate railroading from all other kinds of business is not an unconstitutional discrimination, because no other business is beset with so many and severe dangers as those encountered by employes, in preparing for, and during, the movement and operation of railroad trains. Indianapolis Union R. Co. v. Houlihan* (1901), 157 Ind. 494, 54 L. R. A. 787. *Such classification can not be arbitrarily made. There must exist some good and natural reason for it.*

"We said in *Bedford Quarries Co. v. Bough, supra*, touching this subject: 'Such legislation must not only operate equally upon all within the class, but the classification must furnish a reason for, and justify the making of, the class; that is, the reason for the classification must inhere in the subject-matter, and rest upon some reason which is natural and substantial.' See a large line of authorities collated on pages 674 and 675.

"Laws are general and uniform, not because they operate on all alike, for they do not, but because everyone who is brought within the circumstances and conditions provided by the law is affected thereby.

"Notwithstanding the language of the statute is 'that every railroad or other corporation, except municipal, operating in this State, shall be liable for damages for personal injury suffered by any employe while in its service,' it must not for a moment be understood that the benefits of the statute are extended to all employes of a railroad corporation, or to any other class of employes than those whose duties expose them to the peculiar hazards incident to the use and operation of railroads. There is no reason, in fact or fancy, why the benefits of the statute should be extended to the office and shop employes of railroad corporations, or to others removed from the dangers of train service, and denied to the multitude of other workmen engaged in businesses of like and equal hazard.

"So far as our researches have gone, no court has attempted to set up an arbitrary line of demarkation by which the application of the statute may be determined. It is apparent that no reliable test can be established by any general rule. *Each case must be decided upon its own facts, the court bearing in mind that to keep within constitutional limitations the statute must be construed as designed exclusively for the benefit of those who are, in the course of their employment, exposed to the particular dangers incident to the use and operation of railroad engines and trains, and whose injuries are caused thereby.* Bedford Quarries Co. v. Bough, *supra*. By this we do not mean that it is essential to the bringing of an employe within the statute that he should be connected in some way with the movement of trains, but it seems sufficient if the performance of his duties brings him into a situation where he is, without fault, *exposed to the dangers and perils flowing from such operation and movement*, and is by reason thereof injured by the negligence of a fellow servant described in the act. Williams v. Iowa

Cent. R. Co. (1903), 121 Iowa, 270, 96 N. W. 774, and cases cited; *Frandsen v. Chicago, etc., R. Co.* (1873), 36 Iowa, 372.

"To illustrate more fully by the case last cited: The plaintiff was a section hand, and belonged to a gang of five. He, with the boss and three others, started east on the hand car with their tools. The passenger train going west was then due, but the boss directed the men to proceed east. The train coming in sight around a curve, 250 feet distant, the boss directed an immediate stop and the removal of the car from the track. An effort was made to do so, but on seeing that they were about to be caught by the onrushing train, and when the hand-car was but partly off the track, the boss commanded the gang to flee, but the engine struck the hand car with great force, threw it the direction the plaintiff was fleeing, and it struck and injured him. Held, that the plaintiff's employment related to the perilous business of railroading, and entitled him to the benefits of the statute.

"Do the facts pleaded show the appellee to be within the protection of the statute? He was employed as a common laborer to do service with a repair and construction gang of a street-car company. When injured, he was engaged in unloading rails from a flat car standing on a siding of the street-car tracks. His gang was not engaged in hauling iron on the car. He was not working with a train, not even with the particular car, beyond helping to discharge its load. He was in no sense a trainman. He was not injured by a moving car, nor because the car was designed to move in short trains and on fixed rails. His duties had no connection with the car, nor with the use and operation of the railroad, except to relieve the car of its load. The skid did not slip off and fall upon the appellee because it had rested on a car. If negligently placed, it might have slipped from a standing wagon with precisely the same result.

"We are unable to see how the duties of the appellee exposed him to any of the peculiar hazards of using or operating a railroad within the protection of the statute.

"Iowa in 1862 (Acts 1862 [Iowa], p. 197), enacted a statute, in substance, the same as ours, and, to meet constitutional demands, it was construed by the Iowa Supreme Court, in a number of cases, to relate only to such employes of a railroad as were exposed, in a performance of their duties, to the dangers and hazards arising from the use and operation of railroads. *Deppe v. Chicago, etc., R. Co.* (1872), 36 Iowa, 52.

"In 1872 the statute was amended by inserting in it the following words: 'When such willful wrongs are in any manner connected with the use and operation of any railroad so owned or operated, on or about which they shall be employed' (Acts 1872 [Iowa], p. 70)—thus writing into the statute what the courts had previously read into it by construction. *Schroeder v. Chicago, etc., R. Co.* (1875), 41 Iowa, 344.

"Kansas copied the Iowa statute of 1862, and Minnesota and Indiana have adopted it in substance.

"With respect to the adjudications in Iowa, it is said in *Foley v. Chicago, etc., R. Co.* (1884), 64 Iowa, 644, 649, 21 N. W. 124: 'With the exception of *Deppe v. Chicago, etc., R. Co.* [1872], 36 Iowa, 52, all the actions in which this court has determined that railroad companies are liable in this class of cases are those where the injury was received by the movement of cars or engines upon the track.' Citing seven other Iowa cases to establish the statement.

"Among the many instances in which the benefits of the statute have been denied are the following: In *Malone v. Burlington, etc., R. Co.* (1884), 65 Iowa, 417, 21 N. W. 756, 54 Am. Rep. 11, the plaintiff's duties were to wipe engines, open and close doors of the engine house, remove snow from the turntable and connecting tracks, but he was not, by reason of such duties, employed in the operation of the railroad.

"In *Luce v. Chicago, etc., R. Co.* (1885), 67 Iowa 75, 24 N. W. 600, the plaintiff was employed in a railroad

coal house, and was injured by the negligence of a fellow servant while loading coal upon a car. He was denied the benefit of the statute, because his injuries were connected in no way with the operation of the railroad.

"In *Matson v. Chicago, etc., R. Co.* (1885), 68 Iowa, 22, 25 N. W. 911, the plaintiff was a member of a construction gang, and his duties required him at times to ride upon the train and to work on and about the cars and track. He was injured by the negligence of a co-employee's striking his hand with a heavy stone while engaged in placing stones under the ends of the ties. It was held that the injury was not connected with the operation of the railroad.

"Many other valuable illustrations may be found in *Chicago, etc., R. Co. v. Artery* (1890), 137 U. S. 507, 11 Sup. Ct. 129, 34 L. Ed. 747.

"In *Johnson v. St. Paul, etc., R. Co.* (1890), 43 Minn. 222, 45 N. W. 156, 8 L. R. A. 419, the plaintiff was a bridge carpenter engaged in repairing a bridge on the defendant's railroad, and in doing the work it was necessary to leave the draw partly open. Through the negligence of a co-employee the draw was left unfastened, was blown shut by the wind, and injured the plaintiff. Held, the company was not liable, because the employment did not embrace the peculiar hazard incident to the operation of a railroad, within the meaning of the statute.

"In *Pearson v. Chicago, etc., R. Co.* (1891), 47 Minn. 9, 49 N. W. 302, the plaintiff was a sectionman, and while his crew was engaged in loading rails from the ground onto a flat car, one of the crew negligently let a rail fall upon the plaintiff's arm and injured it. Held, that the injury was not the result of any danger peculiar to, or directly connected with, the use and operation of the railroad, and not within the statute.

"From these considerations we are led to conclude that the employment in which the plaintiff was engaged at the time of his injury does not belong to that distinctive and peculiarly hazardous class of service necessary to the operation of railroad trains, for which special statutory protection finds constitutional sanction." (Our italics.)

The full quotations we have thus made from the Kinney case really furnish all the law we need to produce to this court to demonstrate the error of the Kentucky court in holding that defendant in error, in the case at bar, was embraced by the Indiana statute. The Kinney case is conclusive authority for our contention that he was not. The language of the opinion is so clear and unanswerable that it needs no interpretation by us. Its application to our case is obvious.

There is, as we have said, nothing in any opinion which this court has rendered which conflicts with the soundness of the proposition for which we are here contending that the Indiana statute cannot be constitutionally applied to the facts of this case, without depriving plaintiff in error of its property without due process of law, and denying to it the equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States. In view of the character of defendant in error's employment, the work he was doing when hurt, the reasoning of the Supreme Court of Indiana in the cases cited, and particularly in the Kinney case, and the cases cited and quoted from approvingly in that opinion, it is respectfully submitted that if this case were before that court for decision, it would be bound to hold that defendant in error is not embraced by the statute and that he is not entitled to recover. And, as this court said in *Tullis v. L. E. & W. R. Co.*, 175 U. S. on p. 353, *supra*:

"The elementary rule is that this court accepts the interpretation of a statute of a State affixed to it by the court of last resort thereof."

See, also, *Elmendorf v. Taylor*, etc., 10 Wheaton, 152; *Commonwealth v. International Harvester Co.* (Ky.), 115 S. W. Rep. on p. 706.

"The judges of the Supreme Court of the United States are * * * bound to take judicial notice of

the laws and jurisprudence of all the States and territories." (Story's Equity Pleadings [8th Ed.], Sec. 24, p. 18. See, also, *Owings v. Hall*, 9 Peters, 607, 624, 625.)

But in this case the court of another State (Kentucky) has construed the Indiana statute, and the rule quoted from the *Tullis* case does not apply to the construction the Kentucky court has given the statute. On the contrary, there being conflict between the Kentucky court's construction of the statute and that given it by the Indiana court, this court will be controlled by the latter construction.

In the light of the opinions of the Supreme Court of Indiana, which we have cited, it is clear that that court would not construe the statute as embracing the case of the defendant in error. We submit that this court will construe the statute in the light of the decisions of the Supreme Court of Indiana in order to render the statute constitutional. But, on the other hand, if this court is of opinion that the statute, properly construed, embraces the case of the defendant in error, then we think the court will further declare that the statute, so construed, is violative of the "due process" and "equality" clauses of the Fourteenth Amendment to the Constitution of the United States, and that the statute is void for that reason.

In one part of the opinion of the Court of Appeals of Kentucky in this case (R. p. 143, 127 Ky. 276) the statement is made that it was insisted on behalf of the railroad company that the Act is unconstitutional in that it applies to corporations and does not apply to individuals whose employes may be injured. This was stating the proposition more broadly than we contended for. In the next paragraph of the opinion, however, our contention was correctly stated by the court, to wit:

"It is earnestly insisted that while the act is constitutional under these rulings as to those *operating* a railroad, it can not be held constitutional as to a carpenter; that the State may not establish a rule for carpenters in the service of a railroad, and another rule for carpenters in the service of other people."

The court then goes on to answer this objection in the following language:

"We are unable to see the force of this distinction. A railroad can not be run without bridges; bridges can not be built without carpenters. The work of a bridge carpenter on a railroad is perhaps no less perilous than the work of an operative on one of its trains. Coal tipples are no less essential to the operating of a railroad than bridges, because the engines can not be operated without coal. The construction of a coal tipple is therefore essential to the operating of a railroad."

From the language quoted it will be observed that the Court of Appeals of Kentucky treated the defendant in error as a bridge carpenter engaged in the construction of a bridge at the time he was injured. This is incorrect. The defendant in error was engaged in the construction of a coal chute, or coal tipple, not on the track, but alongside of the track. The opinion, in another place, shows this to be true. The point is probably not very material, because, from our point of view, if the defendant in error had been engaged in the construction or repair of a railroad bridge, there would have been no peculiar hazards incident to the work which would have justified the legislature in providing a remedy in his behalf, when no remedy is given to any other class of carpenters or bridge builders.

But it is well to bear in mind that the work the defendant in error was doing was not even as hazardous as that of building a bridge. He was simply assisting in the erection of a wooden structure alongside of the railroad track. He was engaged in work no more hazardous than if he had been building a similar structure for an individual. The work he was doing was not attended with any greater peril than would have been incident to the erection of a warehouse, a store, or a dwelling house for a corporation other than a railroad, or for an individual.

We think the Court of Appeals of Kentucky was clearly in error in the statement that the work of a bridge carpenter on a railroad is perhaps no less perilous than the work of an operative on one of its trains. But, if this statement is accurate, it is a stronger argument to support the view that there is no such difference between railroad employments and all other classes of employments as to justify the classification of railroads for legislative purposes than it is in favor of upholding class legislation as to all employes of railroads.

Touching this further language used in the opinion of the Kentucky Court: "Coal tipples are no less essential to the operating of a railroad than bridges, because the trains can not be operated without coal. The construction of a coal tipple is therefore essential to the operating of a railroad." So was the coaling of engines essential to the operation of the railroad in the Luce, Stroble, and Reddington cases. So was the work of a car repairer, which Foley was doing. So was the work Malone was doing. Yet, as we have seen, the Supreme Court of Iowa, under a statute similar to that of Indiana, held that the Iowa statute could not be constitutionally applied in those cases. The construction of a coal tipple is no more essential to the operation of a railroad than was the repairing of the railroad draw-bridge in the Johnson case, nor the operation of the steam shovel in the Jemming case, and yet the Supreme Court of Minnesota, as we have seen, held that the Minnesota statute, which is similar to the Indiana statute, could not be constitutionally applied in behalf of Johnson and Jemming.

The construction of a coal tipple is no more essential to operating a railroad than is the mining of coal, or the construction or repair of railroad rolling stock, and yet Judge Brewer recognized in *Railroad Co. v. Stahley*, 62 Fed. 363, *supra*, that the Employers' Liability Act of Kansas could not be constitutionally applied to persons injured in doing any of those things, because, while they pertained to railroad work, they did so only remotely. The coal tipple defendant in error was assisting in erect-

ing was not in use by the railroad company. It was merely in course of construction, with the ultimate purpose of being used in coaling engines. Therefore, the work did not relate directly or immediately to railroad operation in any proper sense. It was by no means as closely related to railroad operation as the rebuilding or repair of a railroad bridge on an operated railroad, or unloading rails as Kinney was doing.

If defendant in error had been injured while doing similar work, in any of the cases last instanced, for any employer other than a railroad company, admittedly he would have had no right of recovery under the Indiana Statute. We insist, therefore, that merely because he was employed by a railroad company in doing work which was not peculiar to railroad operation, and which was not attended with extra hazard, the statute can not be constitutionally applied so as to afford him a remedy for injuries he received while so employed; whereas, if he had been injured while doing similar work for any employer other than a railroad company, he would have been without remedy.

The opinion delivered by the Court of Appeals of Kentucky in this case (127 Ky. 276 to 303, inclusive, 112 S. W. 618), was not the unanimous opinion of that court. Two members of the court—Judges Barker and Lassing dissented. Their dissenting opinion, written by Judge Barker, was not filed until October 7, 1908, and therefore, not in time to have it made a part of the record filed in this court, June 16, 1908. But the dissenting opinion is officially reported in 127 Ky., commencing on p. 292, and it is made an appendix to this brief. We also transmitted to this court, with our brief in opposition to the motion of defendant in error to dismiss or affirm, an official copy of the dissenting opinion, certified to by the clerk of the Court of Appeals of Kentucky under his sign manual and seal of office. The court will observe, on reading the dissenting opinion, that the judges who concurred in it are of opinion, just as we contend in our argument, that the Indiana statute is unconstitutional when construed as the Court of Appeals of Kentucky has construed it.

**THE COURT OF APPEALS OF KENTUCKY REFUSED
TO GIVE FULL FAITH AND CREDIT TO A PUBLIC
ACT OF INDIANA, IN VIOLATION OF ART. 4,
SEC. 1, CONSTITUTION OF THE
UNITED STATES.**

Section 1, Article 4 of the Constitution of the United States provides that, "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State."

This provision of the Constitution laid upon the courts of Kentucky the duty of giving "full faith and credit" to the "public act" of Indiana, known as the Employers' Liability Act, and under which this action was brought.

The meaning, the force and the extent of this act have been determined by the Supreme Court of Indiana. In order to ascertain what the public act of Indiana is we must find out not merely the language of the statute, but must further ascertain what has been determined by the highest court of Indiana as to the meaning of the language used in such statute. To put an extreme case: Suppose that the defendant in error, instead of being an employe of the railroad, had been an employe of some private corporation of Indiana. The Supreme Court of Indiana under its decisions which we have cited, would hold that this public act (The Employers' Liability Act) would not apply to such a case, for the reason that that court has held that the public act applies only to railroads and to their employes. In the supposed case, let us further suppose that the defendant in error had brought suit in Kentucky for an injury received while in the service of such private corporation in Indiana. Under these circumstances, if the courts of Kentucky were to hold that he had a right of action, they would be enforcing not a public act of Indiana, but one which was not a public act of Indiana. In other words, while the public act had been held not to be applicable to an employe of a private corporation, in Kentucky the act would be used as if it embraced such employe. This would not be giving full faith and credit in Kentucky to the public act of Indiana,

but on the contrary, would be applying the public act of Indiana to a state of case which, according to the highest court of that State, it did not apply to at all.

The "full faith and credit" clause was designed to give to the public acts, records and judicial proceedings of one State the same force in other States as they have in the State of their origin; no more, no less. We submit therefore, that the Court of Appeals of Kentucky were bound to accept the construction of the Employers' Liability Act of Indiana, which the Supreme Court of that State has placed upon that statute, and, having failed to do so, that this court must enforce the duty which the State of Kentucky owed in the premises, namely, to give the same faith and credit to the Employers' Liability Act of Indiana which would be given to it in that State; and not a larger, or smaller, or different credit.

While we recognize that this court has held in a number of cases that where the case turns upon the construction by a State court of a statute of another State, and not upon the validity of such statute, a decision on that question is not necessarily of a federal character; yet the court has also held that the question depends upon the particular facts of each case and the manner in which they are presented, how far such questions can be regarded as coming under the full faith and credit clause of the Constitution. (*Finney v. Guy*, 189 U. S. 335.)

In *C. & O. Ry. Co. v. McCabe*, 213 U. S. 207, this court held that where a petition for removal is filed in the State court in which the action is commenced, and the State court denies the removal, it is competent for the removing party to file the record in the Federal court. If a motion to remand is there made and sustained, that is the end of the matter. If a motion to remand is not made, or is made and overruled, the Federal court can protect its jurisdiction by enjoining the further proceeding of the case in the State court, or can proceed to try the case in the Federal court, and its judgment, whether upon the merits or a dismissal for want of prosecution, can be pleaded in bar of the case still pending in the State court; and the refusal of the State court to give full faith and credit to the judgment of the Federal court, as a bar, can be assigned as error in the writ of error to

the Supreme Court of the United States after the final judgment of the highest court of the State.

In *A. T. & S. F. Ry. Co. v. Sowers*, 213 U. S. 55, which was an action brought by the defendant in error in Texas to recover damages received by him while in the employment of the plaintiff in error in the territory of New Mexico, the latter claimed that by the terms of a statute of New Mexico the action thereunder could only be enforced in the District Court of the territory of New Mexico, and that the Texas court, in retaining jurisdiction of the case, and refusing to enforce the territorial statute, denied a federal right guaranteed by the Constitution and statutes of the United States, requiring such faith and credit to be given in every court within the United States to the public acts, records and judicial proceedings of every other State or territory as they have, by law, in the courts of the State or territory from which they are taken. This court held that the action was transitory, and might be enforced in Texas. But the court said (p. 67):

"It is then the settled law of this court that in such statutory actions the law of the place is to govern in enforcing the right in another jurisdiction," etc.

See, also, *American Express Co. v. Mullins*, 212 U. S. 311.

In the case at bar, the decisions of the Supreme Court of Indiana, construing the Employers' Liability Act of that State, were proven as a fact. Those decisions, and others rendered by the same court since that time, show that the Supreme Court of Indiana has done something more than construe the statute. The court has cut down the statute which the legislature enacted, in order to bring it within constitutional limits and thereby avoid the necessity of declaring the statute unconstitutional and void. Hence, it is to the decisions of that court alone we must look in order to ascertain what the Indiana statute means. It has said that unless the statute is construed as the court has held it must be construed, the statute is void, because it contravenes the Fourteenth Amendment. If defendant in error had sued in Indiana instead of

in Kentucky, it is clear that the Supreme Court of Indiana would have denied him a right to recover on the ground that if the statute embraced him it was unconstitutional and void. So that, the question presented here is something substantially more than the *construction* of a statute of one State by the highest court of another State. The construction necessarily involves the validity of the statute, and the construction given the statute by the Kentucky court renders the statute unconstitutional and void under the test which has been applied to the statute, and the meaning which has been given it, by the Supreme Court of Indiana.

In this connection the following excerpt from the opinion of the Supreme Court of Indiana, overruling a petition for rehearing in which the railroad company, for the first time, attempted to raise the question as to whether the Indiana Employers' Liability Act could be constitutionally applied to the facts of that case, in *Indianapolis St. Ry. Co. v. Kane*, 169 Indiana, 40, is interesting:

"Appellant's counsel are in error in their statement that on March 1, 1907, and after appellant's first brief had been filed, this court announced a new interpretation, not only of the Employers' Liability Act, but of the court's previous construction of it. The decision announced on March 1st, namely, *Bedford Quarries Co. v. Bough* (168 Indiana, 671), is in accord with every other opinion of this court relating to the Employers' Liability Act. In effect, it was held in that decision that as to all corporations, other than railroads, said act is unconstitutional, and this was the first decision upon this point by the court. The question had been presented in some previous cases, but never considered, for the reason that it had arisen in cases reversible for other reasons, and the court, guided by a well-established and familiar rule, left the constitutional question unconsidered. Counsel are equally in error in their assertion that we have frequently declared the constitutional validity of the statute, as applied to corporations other than railroads. In a number of cases judgments have been upheld, but it has been uniformly in causes in which the defense as well

as the prosecution has been constructed on the statute, and the cause tried, as in this case, without any one calling in question the validity of the statute as applied to the defendant."

CASES RELIED ON BY DEFENDANT IN ERROR.

We are aware of no suit brought by a railroad employe, which has been decided by the Supreme Court of Indiana since the judgments were rendered in the Lightheiser and Bough cases in which the question of the constitutionality of the statute as applied to the facts of such case has been decided, except the Kinney case, *supra*. We admit our surprise that counsel for defendant in error, on page 8 of their brief, on motion to dismiss or affirm, should have cited Indianapolis Street Ry. Co. v. Kane, 169 Ind. 25, 80 N. E. 841, as a case *contra*. No question as to the constitutionality of the statute was made in the Kane case until after it was decided in the Supreme Court of Indiana. Thereupon, in a petition for rehearing, the plaintiff in error attempted, for the first time, to question the constitutionality of the Employers' Liability Act as applied to the facts of that case. That court disposed of the question by holding that the attempt to raise the constitutional question for the first time in the petition for rehearing came too late. (169 Indiana, 40, 81 N. E. 721.)

The only other case referred to in defendant in error's brief on motion to dismiss or affirm, construing the Indiana statute, as having been decided since the Bough case, is B. & O. S. W. R. Co. v. Walker, 84 N. E. Rep. 730. That case was decided by the Appellate Court of Indiana—an intermediate appellate court, not a constitutional court, but merely one of legislative creation—and the opinions of which court are not authoritative, even in Indiana, where said opinions are in conflict with those of the Supreme Court. Furthermore, in the Walker case, no question seems to have been presented as to the constitutionality of the statute as applied to the facts of that case. And, again the Walker case was decided April 28, 1908, whereas the Kinney case was not decided until October 27, 1908.

One of the grounds for which a cause may be transferred from the Indiana Appellate Court to the Indiana Supreme Court is that the opinion of the Appellate Court contravenes a ruling precedent established by the Supreme Court. Section 1382, sub. 1, part 2, of Burns' Annotated Indiana Statutes (1908), provides that "the appellate court shall not have jurisdiction of any case where the constitutionality of a statute, Federal or State, or the validity of an ordinance of a municipal corporation is in question and such question is duly presented." See, also Section 1394, of the same compilation of Indiana statutes.

But there is a still later case, decided by the Appellate Court of Indiana, which is in conflict with the Kinney and other cases we rely on, and on which counsel for defendant in error will doubtless rely here. We refer to *C. C. C. & St. L. R'y Co. v. Foland*, 88 N. E. Rep. 787. But in the Foland case, as we learn from the Clerk of the Supreme Court of Indiana, the railroad company, on November 10, 1909, filed a petition in that court for a transfer of the case to said court from the Appellate Court, and the application for transfer (of which we have a copy before us) recites, among other things, that the opinion of the Appellate Court "contravenes a ruling precedent of the Supreme Court" as declared in the Kinney case. Unless the Supreme Court shall conclude that the question was not duly presented, it is impossible to see how that court can fail to reverse the judgment of the Appellate Court in the Foland case, on authority of the Kinney case.

Pittsburg, etc., R. Co. v. Ross, 169 Indiana, 3, 80 N. E. 845, cited on page 7 of the brief for defendant in error, on the motion to dismiss or affirm, while it was decided about a month later than the Bough case, is not an authority against our contention that the Indiana statute cannot be constitutionally applied in behalf of the defendant in error in this case. Ross was a switchman, injured by the movement of cars in a switch yard. His employment was obviously extra hazardous. From the very brief statement in the opinion in that case with respect to the constitutional question, it must be assumed, in view of the character of Ross' employment, that the

constitutional question which the court refused to consider, was not the question we present to this court, but was one challenging the constitutionality of the statute *in toto*. We concede that Ross was within the statute as it can be constitutionally applied. The work of a railroad switchman is one involving hazards peculiar to railroads. The work of a carpenter for a railroad company involves no hazards that are peculiar to the operation of railroads. Such work is just as hazardous when done for an individual or a corporation other than a railroad, as it is when done for a railroad.

St. Louis M. B. T. R. Co. v. Callahan, 194 U. S. 628, cited on page 7 of said brief for defendant in error, is not an authority in this case for at least two reasons:

(1) The question here is not how the Missouri court of last resort construed the Missouri Employers' Liability Statute, and in which construction this court acquiesced in the Callahan case, but how the Supreme Court of Indiana would construe the Indiana statute if the case at bar were before that court for decision.

(2) There was a sudden emergency in the Callahan case, and the work then being done was of a peculiarly hazardous character. Even though it did not relate directly to the operation of railroad trains, it did so very closely.

In the case at bar there was no sudden emergency. The work was not being hurried to completion. There was nothing out of the ordinary either as to the character of the work, or as to the manner in which it was being prosecuted. If it can be said that the work related to railroad operation at all, it did so only very remotely, secondarily and incidentally.

We will briefly comment on the cases cited on pages 10 and 11 of the brief for defendant in error on motion to dismiss or affirm, and which we have not already noticed.

In the Schoolcraft case, a person not in the employment of a railroad company was killed by being struck by a car through the negligence of the railroad employees. He lost his life as a result of negligent railroad operation.

In *Pierce v. Van Dusen*, a railroad yard brakeman, while engaged in switching cars, was injured through the negligence of his conductor. The brakeman was admittedly engaged in an extra hazardous business.

In *Kane v. Erie R. Co.*, a railroad fireman was killed while on duty in a collision occasioned by the negligence of the engineer of another train. Kane's vocation was extra hazardous.

In *Railroad Company v. Carlin*, while the injured employe was a bridge hand, he was injured as a result of railroad operation. The bridge was being repaired while trains were using it. A train approached at great speed, and while crossing the bridge struck a spike maul or heavy iron hammer which had been negligently left on the bridge track by the bridge foreman, and which hammer was thrown against Carlin. The court held that the effect of the Texas Employers' Liability Act was to make the foreman a vice principal as to Carlin and not his fellow-servant. That case was before this court in 189 U. S. 354. There is nothing to show that the constitutionality of the Texas statute, when put to the test of the Fourteenth Amendment, was challenged. This court affirmed the judgment of the Circuit Court of Appeals for the Fifth Circuit. In view of the circumstances of that case, the decision might well have been rested on the proposition that it arose out of railroad *operation*.

In *Edge v. Electric Ry. Co.*, a motorman was injured in a collision between his car and another car, due to the negligence of the car dispatcher. Edge was manifestly engaged in railroad operation.

In *Railroad v. Miller*, a brakeman was injured while under a disabled engine, out on the road,—was injured in train operation.

In *Hancock v. Railroad Co.*, a section hand was injured by reason of the hand-car on which he was riding running into an open switch, negligently so left by a train brakeman. Hancock's case came fairly within train operation.

In *Railroad Co. v. Mohrmann*, while the employe injured was not on a train he was injured by the negligence of a train brakeman.

It must be admitted that the disposition of the Texas, Georgia and North Carolina courts has been to give the employers' liability statutes of those States a more latitudinarian interpretation, as to the character of the employes held to be embraced by said statutes, than has been given to similar statutes of those States by the Mississippi, Iowa, Minnesota, Kansas and Indiana Supreme courts. This is apparent from a reading of the other cases cited by opposing counsel. Still, this does not affect our case. Learned counsel for defendant in error overlook or ignore the decisions of the Mississippi, Iowa, Minnesota, Kansas and Indiana courts, also the fact that the Supreme Court of Indiana has expressly interpreted the Indiana statute as the Mississippi, Iowa, Minnesota and Kansas courts have interpreted the statutes of those States, and evidently disagreed with the Texas, Georgia and North Carolina courts, as no mention is made of any opinions of those courts in the Lighthouse, Bough, Kinney and other opinions of the Indiana Supreme Court. We think the Mississippi, Iowa, Minnesota, Kansas and Indiana courts are right, and that the Texas, Georgia and North Carolina courts are wrong. But this is immaterial in this case. The question is, not how the courts of the last named States construe the employers' liability statutes of those State, but is, how would the Indiana Supreme Court construe the statute of that State involved in this case, if it were before that court? Would it so construe the statute as to hold that defendant in error was embraced by its terms? We think we have made it clear that it would not. The Kinney case is a conclusive answer to the question.

As this court said in *Lochner v. New York*, 198 U. S. on page 53, there are "certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State in the exercise of those powers, and with such con-

ditions the Fourteenth Amendment was not designed to interfere."

The opinion then discussed the decisions of the court upholding statutes enacted by State legislatures under the police powers, but declared that there was no reasonable ground, on the score of health, for the legislature of New York to interfere with the hours of labor of a baker; that "the limit of the police power has been reached and passed in this case." That no law limiting such hours could be justified as a health law to safeguard the public health or the health of the individuals following that occupation; that the statute which forbade bakers working more than sixty hours a week, or ten hours a day, was not a legitimate exercise of the police power of the State, but was an unreasonable, unnecessary and arbitrary interference with the right and liberty of the individual to contract, and as such was in conflict with, and void under, the Fourteenth Amendment to the Constitution. While that case involved the question of the right of a State legislature to deny a person his liberty of contract guaranteed by the Fourteenth Amendment, and the case at bar involves the question of the right of a State legislature to take the property of a railroad company to satisfy the claims of its employees who are injured, and when no other classes of like employees injured under like circumstances would be entitled to compensation, still the principle is the same, and the reasoning of the court in the *Lochner* case is very apposite here. The legislature of Indiana had no more right, if it has attempted to do so, to provide by statute for a right of recovery on behalf of a carpenter who works for a railroad, when the legislature has provided no such right on behalf of a carpenter working for individuals, or for any other class of employer except railroads, than the New York legislature had the right, in the statute which this court declared unconstitutional in the *Lochner* case, to forbid the owner of a bakery, or his employees, from contracting for the employees' working a greater number of hours in the week or day than those fixed by the statute.

We ask the court in connection with this brief to read what was said in plaintiff in error's petition for rehearing in the Court of Appeals of Kentucky, (R. pp. 147

to 161) and in its motion for an oral argument on said petition (R. pp. 161 to 163.) Inasmuch as plaintiff in error is not a corporation of the State of Indiana, but of Kentucky, (R. p. 2) the reasoning in *Railroad Co. v. Paul*, 173 U. S. 404, is inapplicable here.

Wherefore, the plaintiff in error asks that the motion of the defendant in error to dismiss or affirm, which was passed by the court to this hearing on the merits, be denied. And plaintiff in error further asks that the judgment of the Court of Appeals of Kentucky may be reversed by this Honorable Court, and this cause remanded to said Court of Appeals of Kentucky, with directions to send down its mandate to the Circuit Court of Hopkins County, Kentucky, directing it to dismiss defendant in error's petition.

Respectfully submitted,

BENJAMIN D. WARFIELD,
Counsel for Plaintiff in Error.

HENRY LANE STONE,
Of Counsel.



APPENDIX.

COURT OF APPEALS OF KENTUCKY.

October 7, 1908. To be reported (127 Ky. 292).

LOUISVILLE & NASHVILLE RAILROAD COMPANY---*Appellant,*

vs.

SPENCER MELTON -----*Appellee.*

APPEAL FROM HOPKINS CIRCUIT COURT.

DISSENTING OPINION OF JUDGE BARKER.

I find myself unable to concur in the opinion affirming the judgment in this case, and the duty I owe myself, as well as that due the appellant, constrains me, much against my natural inclination, to state the reasons for dissenting from the conclusion reached by a majority of my brethren.

On March 2, 1905, a carpenter's force of the Louisville & Nashville Railroad Company were constructing coal chutes near, but not upon, the tracks or roadway of the railroad company, at the mines of the Ingle Coal Company, at or near Howell, Indiana. The force consisted of seven laborers, including the foreman, one W. C. Shrode, and appellee Melton. In raising, with an ordinary pulley, block and tackle, a bent of timber weighing about one thousand pounds from a partly horizontal to an upright position, the bent fell by reason of a latent defect in the welding of one of the links of a chain, with which one of the pulley blocks was temporarily attached

to the frame work. In falling, the bent fell upon Melton and produced a concussion of his spine, resulting in partial paralysis of his lower extremities. For this injury Melton brought his action against the railroad company in the Hopkins Circuit Court, and elected to proceed under the statute of the State of Indiana, commonly known as the "Employer's Liability Act." A trial of the action resulted in a verdict for compensatory damages in the sum of \$22,000.

As Melton's cause of action is rested upon the Indiana statute regulating the liability of corporations for injuries received by their employes, the first question with which we are confronted is, whether or not that act, as construed by the majority opinion, is constitutional, or whether, on the contrary, it is inimical to the provision in the Fourteenth Amendment of the Federal Constitution, which guarantees to all the equal protection of the law, or, as has been said, the protection of equal laws. As the act in question is fully set out in the opinion of the court, it is not necessary to incorporate any part of it here. It is deemed sufficient to say that it prescribes a different rule of liability for those employers who may be brought within its purview from that imposed by the laws of Indiana upon other employers for injuries occurring to their employes, and unless it can be differentiated by a reasonable classification from those laws, it must be held violative of the Federal Constitution.

It is earnestly contended by counsel for appellant, that the Indiana court of last resort has construed this act to be applicable only to those employers operating railroads; and further, that it has limited its application to injuries occurring to employes engaged in the hazard of the actual operation of the railroad at the time they were hurt. Whether this be so or not, I shall not now investigate. This court has enforced the act as applying to injuries occurring to all railroad employes, whether they be at the time engaged in the active operation of the railroad as such, or whether they are engaged in what may be termed collateral occupations, among which may be included all those occupations which are merely auxiliary to the active operation of the railroad and not subject to the extreme hazard which exists in the active

carrying forward of its operation. This conclusion makes it necessary to inquire whether the act, as construed, is or it not inimical to the equality clause of the Federal Constitution.

As said before, it is not permissible, under the Federal Constitution, to impose arbitrarily upon one class burdens which are not imposed upon the community in general; nor may a legislature arbitrarily impose a liability upon one class of employers which is not imposed upon others. Undoubtedly, the State may regulate the liability of employers to their employes if the classification for regulation be based upon just and reasonable principles; but it may not arbitrarily select one class, whose liability is to be ascertained by rules more stringent than apply to employers generally doing a similar business.

This principle has nowhere been more clearly and forcibly expressed than by the Supreme Court of the United States in *G. C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, where the question we have in hand is discussed. In the opinion, it is said:

“But it is said that it is not within the scope of the Fourteenth Amendment to withhold from States the power of classification, and that if the law deals alike with all of a certain class, it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true (citing many cases), yet it is equally true that such classification can not be made arbitrarily. The State may not say that all white men shall be subjected to the payment of the attorney’s fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. “But arbitrarily selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. No language is

more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews, speaking for this court, in *Yick Wo v. Hopkins*, 118 U. S. 356, 369: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not leave room for the play and action of purely personal and arbitrary power.' The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness.' While such declaration of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. . . . "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection. Tested by these principles, the statute in controversy can not be sustained."

Upon the same subject, the Supreme Court, in *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, said:

"The difficulty is not met by saying that, generally speaking, the State when enacting laws may, in its discretion, make a classification of persons, firms, corpora-

tions and associations, in order to subserve public objects. For this court has held that classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. . . . But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. . . . It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.' "

To the same effect are *Cotting v. Kansas City Stock Yards Company, etc.*, 183 U. S. 79, and *Ballard v. Mississippi Cotton Oil Company*, 81 Miss. 507, 62 L. R. A. 407; *Cooley on Constitutional Limitations*, 7th Edition, pp. 560-563.

In view of the foregoing authority, the question recurs: Does the statute under discussion, as construed in this case, afford a reasonable or just classification when it establishes one rule of liability for injuries occurring to all railroad employes without regard to whether they are engaged in the hazard of railroad operation, leaving the liability of all other employers subject to a less stringent rule of liability? It is a matter of common knowledge that only a small per cent of a railroad corporation's employes are engaged in its active operation. Outside of the men operating the railroad, there is a very large class of employes who are engaged in mere clerical work, and who have no more to do with the actual operation of the railroad as such, than the clerks and book-keepers of any mercantile establishment. Railroads employ many lawyers, surgeons and clerks; some of them keep large forces of men engaged in cutting cross-ties in the forests, or in the breaking of stone for ballast, and in mining coal for the use of the engines. All are engaged in precisely similar business to that

carried forward by other employers who are confessedly not within the purview of the act. The appellee, himself, at the time he was hurt, was engaged as a carpenter in building a coal chute or tippie at the Ingle Coal Mines, near or on the railroad's right of way. It does not appear whether this chute was for the benefit of the railroad or the mining corporation; but I shall assume, in order to eliminate any question of fact, that the chute was being constructed for the purpose of coaling the railroad's engines. Now, let us suppose that the coal company had had a force of carpenters building coal chutes by the side of those being built by appellee, for the purpose of putting its coal on the cars for shipment, and that a similar accident had happened at the same time to one of its employes; the employe of the coal mining corporation, if he had sued, would have been forced to ground his action upon the common law prevailing in Indiana, while if the majority opinion be sound, appellee could maintain his action under the statute. Assuming for the purpose of the argument, that the two accidents were caused by identically the same mishap, we would have different rules regulating the remedy of the injured persons, although the occupation of each was precisely the same. Such illustrations could be multiplied indefinitely, but they would throw no additional light upon the discussion. The appellee, in building the chute by the side of the railroad, was subject to no more hazard than would have been the employes of the coal company, had they been engaged in building chutes for their employer. It seems to me utterly fallacious to say that the statute, when made to apply to the cases of those employes who are hurt in collateral occupations, does not prescribe an arbitrary rule of liability for railroad corporations for injuries to their employes, from which other employers doing identically the same business are exempt.

The view I have expressed above is supported by very high authority. In the case of *Kline v. Minnesota Iron Co.*, 93 Minn. 63, 66, the Supreme Court of Minnesota, in construing a statute of that State, identical in principle with the one under discussion, said:

"This statute has been before the court in numerous cases, and we have uniformly held that it was intended by the Legislature to apply to 'railroad hazards,' and not to railroads as such; that the character of the employment was the test to be applied in determining its validity and not the character of the employer. It was first construed in *Lavallee v. St. Paul, etc., R. Co.*, 40 Minn. 249, 41 N. W. 974, where it was held that, if the statute be held to apply to railroad corporations, as such, it would be invalid and unconstitutional as class legislation, for it is beyond the power of the legislature to single out a particular class of employers, and impose upon them a distinct rule of liability for personal injuries; but, if construed to apply to the character of the employment, the legislation was valid. It was accordingly held in that case that the legislature intended that it should apply to the hazards and dangers peculiar to the use and operations of railroads, and the decision there made has been followed in all subsequent cases."

In the case of *Deppe v. Chicago, etc., R. Co.*, 36 Ia. 52, 55:

"But if the statute be so construed as to apply to all persons in the employ of railroad corporations without regard to the business they were employed in, then it would be a clear case of class legislation, and would not apply upon the same terms to all in the same situation, and hence would be unconstitutional, and manifestly so. To illustrate, suppose a railroad company employ several persons to cut the timber on its right of way where it is about to extend its road, and the land owner employs a like number of persons to cut the timber on a strip of equal length alongside such right of way. If one of each set of employes shall be injured by the negligence of a co-employee, and the employee of the railroad company can, under the statute, maintain an action against his employer and the other can not, then it is clear that the law does not apply upon the same terms to all in the same situation. The law, then, would not have uniform operation, but would be violative of the Constitution just as much as a law that should prescribe

under the same circumstances different liabilities for merchants, for mechanics and for laborers. The manifest purpose of the statute was to give its benefits to employes engaged in the hazardous business of operating railroads. When thus limited it is constitutional; when extended further it becomes unconstitutional."

To the same effect is *Jemming v. G. N. R. Co.*, 104 N. W. 1079; *R. Co. v. Pontius*, 52 Kan. 264; *Johnson v. St. Paul & Duluth R. Co.*, 8 L. R. A. 419; *Lavallee v. St. P. M. & M. R. Co.*, 40 Minn. 249; *Ballard v. Mississippi Cotton Oil Co.*, 81 Miss. 507.

I can not agree to the assumption that the Supreme Court of the United States, in *Tullis v. Lake Erie & Western Railroad*, 175 U. S. 348, upheld the constitutionality of the act in question as construed in the opinion. An examination of the opinion in the case of *The Bedford Quarries Co. v. Bough*, 80 N. E. 529, and the various opinions reviewed therein, will show that the Supreme Court of Indiana limited the application of the statute to the injuries of railroad employes engaged in the hazard of the active operation of the road; and it was this construction that was upheld by the Supreme Court in the case referred to above.

The opinion of the Supreme Court of the United States and that of the Supreme Court of Indiana show that these courts both held that the Indiana statute, as construed by the latter court, was practically the same as the statutes of Kansas and Iowa, as construed by the Supreme Courts of those States; these statutes were construed without doubt to apply only to the hazard of railroading, and it was expressly said if they had been intended to apply to all employes of railroads they would be violative of the Federal Constitution. *Deppe v. Chicago, etc., R. Co.*, *supra*; *Akeson v. Chicago, etc., R. Co.*, 106 Ia. 54, 56; *Railroad Co. v. Pontius*, 52 Kansas, 264; *Railway Co. v. Mackey*, 127 U. S. 205.

To show that the Supreme Court of Indiana was of opinion that the statute under discussion, as construed by it and sustained by the Supreme Court of the United States, is identical with the statutes of Kansas and Iowa,

as construed by the Supreme Courts of those States, I copy the following excerpt from the opinion in *Bedford Quarries Co. v. Bough*, *supra*:

"The Employers' Liability Act of Kansas was the same as the Iowa act above set out. (*Mo. Pac. R. Co. v. Haley*, Admr., 25 Kan. 35, 53), and the Supreme Court of that State, following the construction given by the Iowa Supreme Court, held in 25 Kan., *supra*, p. 53, that it 'embraced only those persons exposed to the hazards of the business of railroading.' *Missouri*, etc., *R. Co. v. Medaris*, 60 Kansas, 151, 154, 155; *Mo. Pac. R. Co. v. Mackey*, 33 Kan. 298, 302.

"It was held, in effect, by this court in *Pittsburg*, etc., *R. Co. v. Montgomery*, 152 Ind. 1, 8-14, that the Employers' Liability Act of this State was capable of severance, by putting railroads in a class by themselves, and that such classification was proper on account of the dangerous and hazardous business of the operation of railroads, and that so construed, said act, as applied to railroads, was not in violation of either said Section 23 of Article 1 of the Constitution of this State, or of the Fourteenth Amendment of the Constitution of the United States, even if unconstitutional as to the other employers and employes mentioned.

"In *Tullis v. Lake Erie*, etc., *R. Co.*, 175 U. S. 348, it was held that this court in the *Montgomery* case treated the Employers' Liability Act as practically the same as said statutes of Iowa and Kansas, and that so construed, it did not arbitrarily classify railroads by name, but with regard to the business in which they were engaged, which was a proper classification on account of the dangerous and hazardous business of operating railroads, citing *Mo. Pac. R. Co. v. Mackey*, 127 U. S. 205; *Minneapolis*, etc., *R. Co. v. Herrick*, 127 U. S. 210, which sustained the constitutional validity of a like statute.

"In *Pittsburg*, etc., *R. Co. v. Lighthouse*, 168 Ind. 438, 78 N. E. 1033, 1041, 1043, this court approved the *Montgomery* case, gave the Employers' Liability Act, as applied to railroads, practically the same construction as

had been given to the statutes of Iowa and Kansas on that subject, and held that putting railroads in a class by themselves was proper classification on account of the dangerous and hazardous business of operating railroads, and that such classification is not based upon the difference in employers, but upon the difference in the nature of the employment."

Nor can I agree to the statement in the opinion, that Melton was engaged in the hazard of the operation of the railroad because he was building a coal chute and coal is necessary to the operation of a railroad. The chute was entirely separated from the railroad's right of way, and the carpenters who were building it were in no danger from anything done in its operation. Railroads, in order to be operated, must have cross-ties and ballast, they must have clerks, bookkeepers and auditors to keep their accounts, lawyers to defend their suits and telegraphers to dispatch their trains, but none of the men employed in these occupations can be said to be engaged in the hazard of the operation of the railroad.

Believing that the statute under which this suit was brought violates the equality clause of the Federal Constitution, and is, therefore, void, I can not concur in the opinion of the court.

I am authorized to say that Judge Lassing concurs in this dissent.

BENJAMIN D. WARFIELD,
WADDILL & DEMPSEY,
for Appellant.

CLAY & CLAY,
GORDON, GORDON & COX,
for Appellee.

THE COMMONWEALTH OF KENTUCKY.

THE COURT OF APPEALS. SEC.

I, Napier Adams, Clerk of the Court of Appeals of Kentucky, certify that the foregoing is a true and correct copy of the dissenting opinion delivered by Judge Barker and concurred in by Judge Lassing, in the case of The Louisville & Nashville Railroad Company vs. Spencer Melton on the appeal from the Hopkins circuit court, as the same appears from the records and files of my office.

In Testimony Whereof, I, Napier Adams, Clerk of the court aforesaid, have hereunto subscribed my name and affixed the seal of this court.

NAPIER ADAMS,
Clerk, Court of Appeals of Kentucky.

(SEAL)

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The Court of Appeals of Kentucky determined the case on the record. The Plaintiff in Error did not plead the construction or application of the Indiana Statute by the courts of Indiana. It did not prove or attempt to prove such construction and application.

The Court of Appeals was therefore left to construe the Indiana Statute pleaded as it would local laws, and it is settled that under such circumstances, no federal question arises.

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Supreme Court of the United States.

OCTOBER TERM, 1909.

NO. 180.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY
Plaintiff in Error

vs.

SPENCER MELTON, Defendant in Error.

BRIEF OF DEFENDANT IN ERROR ON THE MERITS,
AND ON HIS MOTION TO DISMISS AND AFFIRM.

THE CASE STATED.

I.—STATEMENT OF FACTS.

A motion to dismiss and affirm heretofore entered by the Defendant in Error was passed by the Court to the hearing of the case on its merits. That motion contains a statement of the case, which we incorporate herein, as follows:

"The Defendant in Error, Spencer Melton, was in the employ of the Plaintiff in Error, the Louisville & Nashville Railroad Company, as a member of a construction crew. His duties took him from place to place on the railroad company's lines, as ordered by his foreman. On the 21st day of March, 1905, Melton was engaged with the crew, of which he was a member, and under

his foreman, in the construction of a coal tippie or chute for the railroad company, and on its line of road. This tippie or chute was being built by the railroad company, so as to connect with the mine of the Ingle Coal Co., to enable the railroad company to coal its freight and passenger engines. The bents, to be used in the chute, were framed up before their erection and weighed about 1,200 pounds. They were elevated to their position by means of block and tackle operated by the crew. The diagram between pages 138 and 139 of the printed record will enable the Court to get a clear conception of the plan of operation.

"Figure 2, on the diagram, is a chain fastened around a square timber, in which is hitched the block and tackle. This chain was procured by the foreman of the crew, and he ordered it to be used to make the 'hitch or tie'; it was a common iron lock chain, such as is used on farm wagons, composed of links about three inches long, and made of bar iron, five-sixteenths of an inch in diameter. The evidence on Melton's behalf shows that this chain was unsuitable and unsafe for the purpose for which it was used, even if it had been a perfect chain of its kind; and it further shows that it had a defective weld, which could have been discovered if it had been properly inspected by the foreman before he ordered its use. After the block and tackle had been connected up, the bent was raised by the power of the men applied at figure 1. Shortly before the bent reached the height shown in the diagram the foreman ordered Melton to, and he did, take his stand at the place shown by figure 5, to prop the bent up as it was being raised, and to keep it from swerving or swinging out of line. Under these conditions and while the bent was being raised by the power mentioned, the defective weld in the weak chain used, parted, and the bent fell upon Melton, and injured him.

"At the time of his injury, Melton was a resident of Hopkins County, Ky., but was injured in Vanderburg County, Ind. This action was brought, on the 15th of August, 1905, under the Employers' Liability Statute, admitted to be in force in that State. He secured a verdict and judgment in the Circuit Court of Hopkins County, Ky., for the sum of \$22,000.00; this judgment was affirmed by the Court of Appeals of Kentucky, and

the railroad company brings the case to this Court on a writ of error to the Court of Appeals of Kentucky.

"The Plaintiff in Error, according to its assignment of error, claims that the Indiana Employers' Liability Statute, as construed and applied by the Court of Appeals of Kentucky, is violative of section 1 of the 14th Amendment to the Constitution of the United States, in that it deprives the Plaintiff in Error of its property without due process of law, and denies to it the equal protection of the law; and further that the construction and effect given to the Indiana Statutes by the Court of Appeals of Kentucky is in conflict with the construction and effect given to it by the Supreme Court of Indiana."

II.—INDIANA EMPLOYERS' LIABILITY STATUTE.

So much of the Indiana Statute in question as has any bearing on the questions involved, is as follows:

"An act regulating the liability of railroads * * * for personal injury to persons employed by them, fixing the rules of evidence which shall govern in such cases, and providing that the decisions or statutes of other states shall not be pleaded or proven as a defense in this state: Provided, further, that its provisions shall not apply to any injuries sustained before it takes effect, nor in any manner any suits or legal proceedings pending at the time it takes effect, and declaring an emergency. (Approved March 4, 1893.)

"Section 1. Be it enacted by the General Assembly of the State of Indiana, that every railroad * * * operating in this State, shall be liable for damages for personal injury suffered by any employe while in its service, the employe so injured being in the exercise of due care and diligence, in the following cases:

"First: When such injury is suffered by reason of any defect in the condition of ways, works, plant, tools and machinery connected with or in use in the business of such corporation, when such defect was the result of negligence on the part of the corporation, or some person entrusted by it with the duty of keeping such ways, works, plant, tools and machinery in proper condition.

"Second: Where such injury resulted from the negligence of any person in the service of such corporation, to whose order or direction the injured employe at

the time of the injury was bound to conform and did conform."

III.—FINDINGS OF FACT.

When the judgment of a state court comes before this Court for review on a writ of error, it has jurisdiction of Federal questions only. It has no jurisdiction to inquire into the facts found by the state court to exist, except for the purpose of determining whether or not a Federal question is involved. The sole question for this Court to decide, as we understand its jurisdiction, is to ascertain whether or not, in its conclusion of facts and the application and construction of the law thereto appertaining, the state court has denied to the party complaining any right guaranteed to it by the Federal Constitution. Whatever was a question of fact in the state court, is a question of fact here, and the Supreme Court will accept as correct the facts found by the state court to have been established by the evidence. We therefore deem it necessary at this point to present for the consideration of the Court portions of the opinion of the Court of Appeals of Kentucky, for the purpose of showing the facts found by that court to exist. The original opinion may be found copied at pages 142-145 of the printed record herein; and the extended opinion, or response of the court to the petition for rehearing, at page 173 of the printed record, from which we quote the following—the italics being our own:

"Spencer Melton was a carpenter in the service of the Louisville & Nashville Railroad Co., and on March 2, 1905, was engaged in building a coal chute *on the railroad tracks* near Howell, Ind., working under a foreman named Shrode." (Printed record, P. 142.)

* * * * *

* * * * * "A railroad cannot be run without bridges; bridges cannot be built without carpenters. The work of a bridge carpenter on a railroad is perhaps no less perilous *than the work of an operative* on one of its trains. Coal tipples *are no less essential* to the operating of a railroad than bridges, because the engines

cannot be operated without coal. *The construction of a coal tipple is therefore essential to the operating of a railroad.*" (Printed record, 144.)

The Court of Appeals of Kentucky, after an examination of the record, and after considering the evidence therein contained, found the facts in the case to be—that the Defendant in Error was injured while at work for the railroad company constructing a coal chute "*on the railroad tracks*" of the company; that while engaged at this employment he was employed at work "*essential to the operating of a railroad*"; and that this work was "*no less perilous than the work of an operative on one of its trains.*" The state court further found (Printed Record 173), "We are also unable to see that the conclusion we reached is not in keeping with the construction of the statute by the Supreme Court of Indiana."

IV.—THE CONSTRUCTION OF THE INDIANA EMPLOYERS' LIABILITY STATUTE BY THE COURTS OF INDIANA WAS NEITHER PLEADED NOR PROVED IN THE STATE COURT.

It is claimed that the Indiana Employers' Liability Statute in question, as construed by the Kentucky Court of Appeals, and applied to the facts of this case as above outlined, denies to the Plaintiff in Error the equal protection of the laws, as guaranteed to it by the Federal Constitution. At the very threshold of the argument we are met with the proposition that this question does not come to this Court for its independent and original consideration—but that the Supreme Court of Indiana has construed it not to apply to a case wherein it is claimed the facts were somewhat similar to those in the case at bar, and therefore it is claimed that both the Court of Appeals of Kentucky and the Supreme Court of the United States "are bound to accept the construction of the Employers' Liability Act of Indiana which the Supreme Court of that State has placed upon said statute." We shall notice the case of *Indianapolis, &c. R. Co. vs. Kinney*, 85 N. E. 954, upon which

counsel for Plaintiff in Error rely, at a later place in this discussion. At this point we only pause long enough to call attention to the fact that the case at bar was decided by the Kentucky Court of Appeals on November 19, 1907 (Printed Record 141); the petition for re-hearing was over-ruled and the response thereto delivered May 13, 1908 (Printed Record 172 and 173); and the Assignment of Error, as well as the Writ of Error, were filed May 21, 1908 (Printed Record 173 and 175); while the Kinney case, *supra*, was not decided by the Supreme Court of Indiana until October 27, 1908, more than five months after the judgment in this case had passed beyond the control of the court which rendered it. The Court of Appeals of Kentucky could not, therefore, have been bound by a decision of the Supreme Court of Indiana which had not been rendered, and which was not rendered for more than five months thereafter. The judgment of the Kentucky Court of Appeals in this particular case is before this Court for review, and not the judgment of the Supreme Court of Indiana in some other case. While we do not admit the correctness of the construction given by counsel for Plaintiff in Error to the decision in the Kinney case, *supra*, yet granting, *arguendo*, its correctness for the time being, we deny its application or effect here. This Court, in this particular case, has no jurisdiction over the question as to whether or not the Kentucky Court of Appeals has, or has not, given the statute in question the same construction and effect that it has been given by the Supreme Court of Indiana, nor, as to whether the Kentucky court has given full faith and credit to the laws of Indiana.

This Court, reviewing the judgment of a state court, has jurisdiction only of Federal questions. It has jurisdiction only of such Federal questions as were raised in the state court, and decided by that court, or which were necessarily involved in the decision. In this case the sole and only Federal question involved, or which was relied upon in the state court, was the one single

question as to whether the statute in question, applied to the facts of this case, denied to the Plaintiff in Error the equal protection of the law.

In order that there may be no doubt upon this score, we ask the Court to bear with us while we review, as briefly as possible, the pleadings in the case and so much of the evidence as sheds any light upon this statement. The references to the record here and elsewhere herein are to the printed transcript.

IV.—1.—PLEADINGS REVIEWED.

(1) The original petition (Record page 1) only attempts to set forth a cause of action at common law under the rules of pleading in Kentucky.

The answer to the original petition (R. 4) contains three paragraphs. 1. A traverse of the material allegations of the petition. 2. A plea of contributory negligence. 3. A plea of assumption of risk by the injured employee.

The original reply (R. 5) is but a traverse of the affirmative allegations of the answer.

The first amended petition contains a plea of the Employers' Liability Statute of the State of Indiana (R. 7), and so much of that act as plaintiff's counsel deemed applicable to the case at bar, was copied into the amended petition. Facts were then pleaded to bring the plaintiff within the provisions of that act.

The answer to this amended petition (R. 11) is in two paragraphs:—1. The defendant denies that "any part of the Statute pleaded in said petition applies to plaintiff's cause of action." The remainder of this paragraph is a denial of the facts set forth in the amendment. 2. The second paragraph, by failing to deny, admits the passage of the Indiana Statute pleaded (Ky. Code, Sec. 126); sets up the title of that act and pleads the 4th section thereof; and on the title and the 4th section of the act, based the following plea:

"Defendant says that the Indiana Statute pleaded does not have and was not intended to have any extra

territorial effect, and that it is operative in said state alone and not in Kentucky. Defendant says that no principle of comity requires or admits of the enforcement of the Indiana Statute pleaded in the amended petition in any forum, and that the State of Indiana intended that said statute should not be enforceable in the State of Kentucky."

The reply of the plaintiff to the foregoing answer of the defendant (R. 13) admits the title and the 4th section of the Indiana statute were as quoted by the defendant; denies the conclusions of law pleaded; and pleads the decision of the Supreme Court of Indiana rendered in the case of *Baltimore & Ohio S. W. R. Co. vs. Reed*, 156 Ind. 25, holding that portion of the Indiana Statute unconstitutional and null and void.

The defendant's rejoinder to the plaintiff's reply (R. 14) admits the decision of the Supreme Court of Indiana in the case pleaded, but denies the construction and application given it by the plaintiff.

The defendant subsequently filed an amended answer (R. 15), in which it pleads its construction of the common law rule as administered by the courts of Indiana. The pleader concludes the Indiana Statute in question has no application to this case (upon what ground is not stated). It asks the court to accept the defendant's construction of the common law and to hold that under the common law as in that state administered, the foreman was a fellow servant for whose negligence the defendant was not liable.

Every allegation of this amended answer, all statements of fact, as well as all conclusions of law, were denied and put in issue by the reply filed by plaintiff. (R. 17).

The 2nd amendment to the petition, filed by plaintiff (R. 18), is not pertinent to the questions before this Court, as it contains only allegations of fact connected with the infliction of the injury, to more fully conform to the rules of pleading in the courts of Kentucky.

The Federal question, and the only one in our opinion, involved in this case is presented in the next plea or "Additional Amendment to Answer" filed by the defendant (R. 20). In this amendment, the defendant pleads that the statute in question, if construed to apply to the facts of this case, is violative of the Constitution of Indiana, and of the equal protection part of *Section 1, Article 14, of the Constitution of the United States*.

The reply (R. 21) is a complete traverse of the foregoing amendment.

The answer of defendant to the 2nd amended petition (R. 22) is but a traverse of the allegations contained in that pleading.

The pleadings, as finally made up, present these issues:

1. The general question of negligence on the part of the defendant, and contributory negligence and assumption of risk on the part of the plaintiff.

2. The construction of the Indiana statute in question, with the view of determining whether or not it applies to the facts of this case.

3. The question as to whether or not the statute in question, applied to the facts of this case, is in violation of the Indiana Constitution.

4. The question as to whether or not the statute in question, applied to the facts in this case, violates the equal protection provisions of the 14th Amendment to the United States Constitution.

It is unnecessary to review the evidence, or to notice the first question above shown, further than to say, that the jury found the defendant guilty of negligence under the facts, and held the plaintiff not guilty of contributory negligence. The trial judge adopted these findings of fact when it rendered the judgment on the verdict. The Court of Appeals of Kentucky followed and accepted the findings of the trial court, and affirmed the judgment. These findings of fact, peculiarly within the jurisdiction of the

State Court, are binding upon this Court, and are final. In fact, we do not understand that Plaintiff in Error raises any question in this Court upon this issue. Nor is any question raised here as to the third issue, above outlined, relating to the Indiana Constitution.

The second issue presented by the pleadings, as we have shown, is, as to whether the Indiana statute in question can be so construed as to apply it to the facts of this case. Your Honors will notice, that nowhere in the pleadings is it alleged that the Supreme Court of Indiana had or would construe the statute so as to make it non-applicable to the facts of this case, nor does the defendant plead any decision of the Supreme Court of Indiana construing this statute.

IV.—2.

DECISIONS PLEADED AND PROVED RELATE ONLY TO COMMON LAW OF INDIANA.

(2) When we come to examine the evidence, we find that on the trial of the case the defendant does not prove in any way, either by introducing any decision of the Supreme Court of Indiana, nor by the testimony of any one learned in the law, the construction given this statute by the courts of Indiana. It does introduce in evidence three decisions of the Supreme Court of Indiana—Southern Indiana Railway Co. vs. Harrell, 68 N. E. R. 262 (R. 118-125) ; Indianapolis &c. R. Co. vs. Freeman, 69 N. E. 669, (R. 129-138) ; and New Pittsburgh Coal & Coke Co. vs. Peterson, 136 Ind. 398 (R. 125-129). Neither of these three decisions construe the Employers' Liability Statute in question, but all of them relate to the common law of Indiana, and give the common law rule of that state.

In the Harrell case *supra*, the Court said:

"As to the Employers' Liability Act, it is evident that the appellant is not liable under the second subdivision of the first section. That subdivision was not intended to create a liability based on an order or direc-

tion, where such order or direction was as broad as the whole service, and where the injured servant without the compulsion of an order or direction from one whose order or direction he was required to obey, was at the time governing himself according to his own judgment as to what was proper. In so far as the fourth subdivision of said section is concerned, it does not appear that Gratzner belonged to any of the classes of servants particularly mentioned therein. The latter part of said subdivision is not any broader than the common law upon the subject; so we may as well consider the remaining question as to liability from that standpoint."

The 4th subdivision of the act mentioned in the above case is not involved in the case at bar. The second subdivision is involved. But in the case at bar, the orders of the foreman were not as broad as the whole service, nor was Melton governing himself according to his own judgment as to what was proper without the compulsion of an order or direction from one whose order or direction he was required to obey. On the other hand the evidence shows, and the Court of Appeals of Kentucky finds as a fact, that Melton was at the time acting under the orders of the foreman, as will appear from the following language quoted from the opinion in this case:

"The instructions are in accord with the statute. The foreman ordered the men to use the chain; he ordered them to lift the bent with the block and tackle; he ordered Melton to get a piece of timber and prop the bent, and when Melton was obeying his order, in his presence and under his personal supervision, the bent fell by reason of the breaking of the chain and injured him." (Printed record p. 145.)

The court then in the Harrell case proceeds in the opinion to the application of common law rules, independent of the statute, and holds in that particular case that the petition failed to allege a cause of action. The fourth subdivision of the statute not being involved in the case at bar; what is said by the court with reference to the second subdivision having no application to the facts of this case as found by the court to exist; and there being no

question here of the rule at common law—it follows that the Harrell case, introduced in evidence, has no application whatever to this case.

The Freeman case, *supra*, read by the defendant in evidence, contains no construction whatever of the Employers' Liability Statute. It decides with reference to this statute, that the allegations of the third and fourth paragraphs of the complaint "wholly fail to bring appellee within any of the provisions of the employers' liability act of 1893." All the rest of the opinion is devoted to a discussion and application of the rules of the common law.

The Peterson case, *supra*, read by the defendant in evidence, was a suit growing out of an injury inflicted between July 30, 1888, and Feb. 19, 1889, before the Employers' Liability Statute was passed, and is devoted altogether to a discussion and application of common law principles.

We say, therefore, that the defendant not only wholly failed to plead that the Indiana courts had construed this statute not to apply to the facts of this case, and wholly failed to plead any construction whatever of the statute by the Indiana courts, but it wholly failed to prove that the Indiana courts had given to the statute the construction contended for by it, or had construed it at all. It also wholly failed to plead any decision of the Supreme Court of Indiana holding the statute unconstitutional, or to prove in any way that any part of the statute had ever been held to violate the provisions of the Indiana Constitution. It did not even introduce in evidence, or prove in any way, the provisions of the Constitution of Indiana.

IV.—3.

PROVISIONS OF KENTUCKY STATUTE RELATING TO PROOF OF RECORDS AND COURT PROCEEDINGS OF OTHER STATES.

(3) Sections 1624 and 2419 Kentucky Statutes, provide what laws the courts of Kentucky will take judicial notice of, and Sec-

tion 1635 provides how the decisions of other states shall be proved and what effect they shall have. This last section is as follows:

"Records of courts of other States, and United States.—The records and judicial proceedings of any court of any State, attested by the clerk thereof, with the seal of the court annexed, if there be a seal, and certified by the judge, chief justice or presiding magistrate of the court, shall have full faith and credit given to them in this state as they would have at the place whence the said records come. The record and judicial proceedings of any court of the United States, attested by the clerk thereof, with the seal of the court annexed, if there be a seal, shall have such faith and credit given to them in this Commonwealth as they would have in the courts of the United States."

IV.—4.—MOTION FOR NEW TRIAL.

(4) Before the defendant could be heard in the Court of Appeals of Kentucky, it was necessary under the Codes of Practice of Kentucky (Ky. Civil Code Sec. 340) to file a motion for a new trial giving the grounds or reasons upon which the motion was based. The defendant did this (R. 26). Although this motion contains fifteen reasons for setting aside the verdict and judgment, in none of them is it claimed that the Indiana courts had given the statute in question a different construction to that which the trial court gave it, and in none of them was it claimed that the Indiana statute had been held violative of the Constitution, State or Federal, by the Supreme Court of Indiana.

V.—CONSTRUCTION AND APPLICATION OF STATUTE BY COURT OF APPEALS.

With the record in this shape, the case went before the Kentucky Court of Appeals. The statute in question is an Indiana state statute upon which the plaintiff bases his right of recovery. It becomes necessary for it to construe the statute and apply it to the facts of this case. No rule of law required the Kentucky Court of Appeals to take judicial notice of the decisions of the Supreme Court of Indiana, except such of them as were pleaded

and proved. The law of a state, and the construction given the statute of another state by the courts of that state, are questions of fact to be pleaded and proved, just as any other fact, on the trial of a case in the courts of any other state. The statute in question was pleaded and admitted as the law of Indiana, and there was nothing for the Court of Appeals of Kentucky to do, except to give that statute an independent construction. It had the right to consider other decisions of that court and the courts of other states merely as illustrative, but it was bound to consider no decision of that court except those pleaded. When the Court of Appeals of Kentucky comes to pass on the case, it quotes the Indiana statute, construes it, applied it to the case at bar, and decides that as thus construed and applied it violates no provision of the Federal Constitution (Printed Record p. 142-146). On a petition for re-hearing it held again that the statute "as construed in the opinion" was not in violation of the 14th Amendment to the Constitution of the United States; it also held that there was nothing in the case to show that its construction was "not in keeping with the construction of the statute by the Supreme Court of Indiana."

ARGUMENT.

I.—FULL FAITH AND CREDIT.

The construction of the Indiana statute by the Supreme Court of that State having been neither pleaded nor proved, the statute, properly pleaded and admitted, having been construed by the Kentucky Court of Appeals to apply to the facts of this case—this Court has no jurisdiction to inquire into the question as to whether the construction of the state statute is right or wrong, nor as to whether it is in conflict with the construction of the statute by the Indiana courts. That is a question exclusively within the jurisdiction of the state court, and its conclusion thereon is binding here. If the Plaintiff in Error wished to raise in this Court the "full faith and credit" question under the Fed-

eral Constitution, it was necessary for it to plead and prove that the Supreme Court of Indiana had given the statute a different construction from that given to it by the courts of Kentucky, or to plead and prove its construction by the Indiana Supreme Court.

That the Supreme Court is not bound by the decisions of the Indiana Supreme Court, and will not take judicial notice of the decisions of the courts of that state under the circumstances above shown, is settled by repeated adjudications of this Court, among which we cite the following:

In *Eastern B. & L. Assn. vs Ebaugh* 185 U. S. 114, the Court through Mr. Justice McKenna said:

"This is a writ of error to the state court, and whatever was a question of fact there, is a question of fact here.

* * * * *

"A necessary element in both propositions (if they may be regarded as independent) is the law of New York; and in the latter is involved, not only what the statutory law is, but what its application is under the decisions of the courts of that state. Both, as we have seen, were facts to be proved, and the finding upon which is binding upon us."

In *Chicago &c. R. Co. vs. Wiggins Ferry Co.* 119 U. S. 615, the court, speaking through Mr. Chief Justice Waite, said:

"Whenever it becomes necessary under this requirement of the Constitution for the court of one state, in order to give faith and credit to a public act of another state, to ascertain what effect it has in that state, the law of that state must be proved as a fact. No court of a state is charged with knowledge of the law of another state; but such laws are in that court matters of fact, which, like other facts, must be proved before they can be acted upon. This court and the other courts of the United States, when exercising their original jurisdiction, take notice, without proof of the laws of the several states of the United States; but in this court, when acting under its appellate jurisdiction, whatever was matter of fact in the court whose judgment or decree is under review is matter of fact here."

In *Glen vs. Garth* 147 U. S. 360 it was thus put by Mr. Chief Justice Fuller:

"If we were to assume jurisdiction of this case, it is evident that the question submitted would be, not whether the decision of the New York court was against a right specially set up and claimed under the Constitution of the United States, or necessarily arising, but whether in that decision error intervened in the construction of the statutes of Virginia. If every time the courts of a state put a construction upon the statutes of another state, this court may be required to determine whether the construction was incorrect, it would follow that the state courts had refused to give full faith and credit to the statutes involved, our jurisdiction would be enlarged in a manner never heretofore believed to have been contemplated."

Again at page 369:

"This record may be searched in vain for any proof that as a matter of fact, the public acts of Virginia had, by law or usage in Virginia, any other effect than was given them in New York; nor can the contention of counsel, that the Virginia Statutes should be construed according to their views be treated as the equivalent as the express assertion of a right arising under the Constitution or laws of the United States."

The case of *Lloyd vs. Matthews* 155 U. S. 223, was on a writ of error to the Court of Appeals of Kentucky, and involved the administration of an Ohio Statute. We quote the following pertinent paragraphs from the opinion delivered by Mr. Chief Justice Fuller:

"Now, in arriving at these conclusions, the Court of Appeals did not concur with the views of Harper's Assignee, but does it therefore follow that full faith and credit was denied to the laws of Ohio and to the construction of such laws by the highest court of the state? The courts of the United States where exercising their original jurisdiction take notice, without proof, of the laws of the several states, but in the Supreme Court of the United States when acting under its appellate jurisdiction, whatever was matter of fact in the state court whose judgment or decree is under review is matter of

fact here, and whenever a court of one state is required to ascertain what effect a public act of another state has in that state, the law of such state must be proved as fact. (Cases cited).

"The court of appeals was obliged to determine the case on the record, and plaintiff in error has failed to plead the construction given the Ohio statutes by the courts of Ohio, or to introduce the printed books of cases adjudged in the State of Ohio, or to prove the common law of the state by the parole evidence of persons learned in that law, or to put in evidence the laws of that state as printed under the authority thereof, or a certified copy thereof as provided by law of Kentucky. (Statute cited).

"The court of appeals was left, therefore, to construe the parts of the Ohio laws that were pleaded as it would local laws; and it is settled that, under such circumstances, where the validity of a state law is not drawn in question, but merely its construction, no Federal question arises."

To the same effect are the following cases:

Johnson vs. N. Y. L. Ins. Co., 187 U. S. 491.

Banholzer vs. N. Y. Ins. Co. 178 U. S. 402.

Allen vs. Alleghany Co. 196 U. S. 458.

Eastern B. & L. Assn. vs. Williamson, 189 U. S. 121.

Finny vs. Guy, 189 U. S. 335.

The rule on this question in Kentucky is the same as in this Court.

Adams Express Co. vs. Walker, 119 Ky. 127.

Root vs. Merriwether, 8 Bush (Ky.) 400.

These citations are sufficient to show that in the absence of pleading and proof, the Kentucky Court of Appeals was not required to take judicial notice of, and was not bound by any decision of the Supreme Court of Indiana construing or applying, or refusing to apply the statute in question. According to its independent construction of the Indiana statute, it held the act to apply here, and thus gave the statute the full faith and credit required of it.

We do not question the jurisdiction of the Supreme Court of the United States to pass upon the constitutionality of the statute in question, if the question of its constitutionality has been plead-

ed and relied on in the state trial court. This we concede. But we do question the jurisdiction of the Court, in this case, to consider the question, as to whether the Kentucky Court of Appeals has, or has not, given the statute in question the same construction and application as the Supreme Court of Indiana. We do question the statement of counsel for Plaintiff in Error, as given in its assignment of error, that, "both this Honorable Court and the Court of Appeals of Kentucky are bound to accept the construction of the Employers' Liability Act of Indiana which the Supreme Court of that state has placed upon the statute." Neither the Kentucky Court of Appeals nor the Supreme Court of the United States are bound, in this case, by any decision of the Supreme Court of Indiana, construing the statute. The only construction of this statute which this Court is bound by in this case, is the construction placed upon it by the Court of Appeals of Kentucky, and the only question open for the consideration of this Court—the only Federal question properly raised in this case—is the single one raised in the "Additional Amendment to Answer" heretofore outlined, namely, whether or not the act in question as construed and applied by the Court of Appeals of Kentucky in this case denies to Plaintiff in Error the equal protection of the laws, within the meaning of the equality clause of the 14th Amendment. In considering that question the Kentucky Court of Appeals considered and cited numerous cases, including some from Indiana. This Court may do likewise. In considering this constitutional question this Court is bound by no decision of any inferior court, Federal or State. It will accept the construction and application of the statute made by the Kentucky Court of Appeals, and to that extent it is bound by the decision of that court in this case, but as to whether the act thus construed and applied, violates the provisions of the Federal Constitution, this Court is the final arbiter, and to its decision all knees must bend—all heads must bow, in submission.

II.

THE EMPLOYERS' LIABILITY STATUTE OF INDIANA, AS CONSTRUED AND APPLIED BY THE KENTUCKY COURT OF APPEALS BY ITS JUDGMENT IN THIS CASE, IS NOT OBNOXIOUS TO, OR IN CONFLICT WITH, THE PROVISIONS OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

1. The general proposition that the statute in question was violative of the 14th Amendment to the Constitution of the United States, was first presented to the Supreme Court of Indiana in the case of *Pittsburg &c. R. Co. vs. Montgomery*, 152 Ind. 1. That court held that as to railroad companies the statute was valid; that it was severable, and even though it might be invalid as to "other corporations," yet if valid as to railroad companies, the defendant in that action, being a railroad company, could not raise the objection.

In *Tullis vs. Lake Erie &c. R. Co.* 175 U. S. 348, the question of the constitutionality of the act on the ground of class legislation was presented to this Court. This Court reviewed the decision of the Supreme Court of Indiana in the *Montgomery* case, and upheld the constitutionality of the act as applied to railroads.

In a later case than the *Montgomery* case, *Pittsburg &c. R. R. vs. Leightheiser*, 78 N. E. 1033, the constitutionality of the act as applied to railroads was again raised upon the ground that the act applied to "railroad corporations" only, and not to non-corporate railroads, and for that reason it was claimed to violate the 14th Amendment. The Supreme Court of Indiana, however, held that the act applied to all railroads, corporate as well as non-corporate, and again upheld the validity of the act.

In a still later case, *Bedford Quarries Co. vs. Bough*, 80 N. E. 529, the Supreme Court of Indiana held that while as to railroads, corporate as well as non-corporate, the statute was consti-

tutional, as to "other corporations" it was not constitutional, because non-corporate employers, in the same class, were not included in the act.

In deciding this case, the Kentucky Court of Appeals gave the statute the same construction that it had been given in the four cases above mentioned, and cited and approved each and all of them. (Printed record, p. 143.)

In *Pittsburg &c. R. R. Co. vs. Ross*, 80 N. E. 845, decided after the *Bedford Quarries* case was decided, the Supreme Court of Indiana again held the statute constitutional as applied to railroads. This case came before this Court on a writ of error to the Supreme Court of Indiana. A motion to dismiss, affirm and penalize was entered by the Defendant in Error, and on the 7th day of December, 1908, the motion was sustained by this Court, the writ of error was dismissed, and the judgment of the Supreme Court of Indiana was affirmed. *Pittsburg &c. R. R. Co. vs. Ross* 212 U. S. 559.

Thus we see that in numerous cases the Supreme Court of Indiana has upheld the constitutionality of the statute in question, in so far as it applies to railroads, and in two cases its validity as applied to railroads has been upheld by this Court. It is insisted, however, that in all these cases the employe of the railroad company was injured in actual train service, and that, therefore, they have no application to this case.

Certain provisions of the statute in question have no application to this case, or to the questions here involved. Certain other provisions have been eliminated by judicial action, which both this Court, in other cases, and the Court of Appeals of Kentucky in this case, have concurred in. Eliminating the non-essential provisions, and the portions stricken out by the judiciary, the title of the act as it then stands should be read—"An act regulating liability of railroads * * * for personal injury to persons employed

by them," etc., and the first section, and the first and second sub-sections of section one, should be read as follows:

"Section 1. Be it enacted by the General Assembly of the State of Indiana, that every railroad * * * operating in this state shall be liable in damages for personal injury suffered by *any* employe in its service, the employe so injured being in the exercise of due care and diligence, in the following cases:—

"First. When such injury is suffered by reason of *any* defect in the condition of ways, works, plant, tools and machinery connected with or in use in the business of such corporation, when such defect was the result of negligence on the part of the corporation or *some* person entrusted by it with the duty of keeping such way, works, plant, tools or machinery in proper condition.

"Second. Where such injury resulted from the negligence of *any* person in the service of such corporation, to whose order or direction the injured employe at the time of the injury was bound to conform and did conform."

The Third and Fourth sub-sections of Section One relate to rules, regulations and by-laws, and to the negligence of persons in charge of any signal telegraph office, switch-yard, shop, round-house, locomotive engine, or train upon a railway, or in other words, to the operation, not of railroads generally, but to the operation of trains of cars on the railroad. The first and second sub-sections quoted are separate and distinct from the 3rd and 4th sub-sections, and relate to and regulate the liability of the railroad, for *any* negligence of *any* employe of the railroad, "*entrusted by it with the duty of keeping such ways, works, plant, tools or machinery in proper condition,*" and of *any* injury which may result to *any* employe, "*from the negligence of any person in the service of such corporation, to whose order or direction the injured employe at the time of the injury was bound to conform and did conform.*"

The Court of Appeals of Kentucky has found as a fact that the Defendant in Error comes within the terms of the statute as quoted. If this is true and the Supreme Court of the United

States has upheld the constitutionality of the whole of that part of the act quoted above, then it seems to us this ought to settle the question. We think it is settled by both the Tullis and Ross cases, *supra*, decided by this Court. The Kentucky Court of Appeals holds, exactly what was held in the Tullis and Ross cases, to-wit: That the act applied to railroads only is not in conflict with the 14th Amendment.

Counsel for Plaintiff in Error construe the decision of this Court in the Tullis case to mean nothing more than that the statute is valid as to railroads only when the employe is injured in actual train service, because the Montgomery case therein cited was such a case. We do not so understand the decision. It is true this Court says the statute, as construed and applied by the Supreme Court of Indiana, does not violate the 14th Amendment, but this Court also goes further and states how the Supreme Court of Indiana had construed and applied the statute. It reviews the fact that the Supreme Court of Indiana had held the statute valid as to *railroad companies*, not in cases where the employe is injured in train operation—but to railroad companies generally; it further states that the Supreme Court of Indiana had held the act capable of severance, and if it was valid as to railroad companies, such companies could not make the objection that it was invalid as to "other corporations." In other words, this Court held that the Supreme Court of Indiana had construed the act to be severable and valid as to railroad companies, and had applied it to railroad companies, and as thus construed and applied it held the act did not violate the 14th Amendment.

The Tullis case was presented to this Court on a certificate from the United States Court of Appeals for the Seventh Circuit. Neither this certificate, nor the opinion of the court, states how the employe was injured, or whether it was in or out of actual train service. It is evident that neither court considered that question a pertinent one. The only fact necessary to be stat-

ed was the fact that the servant was injured "while in the employment of the defendant, caused by a negligent act of a fellow servant, for which the Defendant in Error is alleged to be responsible by force" of the very act in question. The first section of the act in question, including the two sub-sections relied on in this case are then quoted, and the question is then submitted as to whether the act is valid, or violates the 14th Amendment. The opinion of the Court was delivered by Mr. Chief Justice Fuller, and in it is found this plain, simple, unadorned and conclusive paragraph:

"Considering this statute as applying to railroad corporations only, we think it cannot be regarded as in conflict with the 14th Amendment." (Citing a number of cases.)

Could anything be clearer than these words? Take them by themselves, or in connection with the remainder of the opinion—take the opinion as a whole, and the certificate upon which it was decided, and it seems to us that this Court has by this decision settled the question here at issue. The Defendant in Error was an employe of the railroad company; he was injured by reason of a defect in the condition of the ways, works, plant, tools or machinery; and such defect was the result of the negligence of the foreman, who was the person entrusted by it with keeping them in proper condition; and also by the negligence of the person to whose order or direction he was at the time of the injury bound to conform and did conform. The existence of these facts are concluded by the decision of the state court.

2. If we should be mistaken, however, in our construction of the opinions of this Court in the Tullis and Ross cases, it by no means follows that the construction placed by the Court of Appeals of Kentucky upon the statute in question renders it to that extent unconstitutional.

That the state "may distinguish, select and classify objects of legislation, and necessarily this power must have a wide range of discretion," is well settled. (Magoun vs. Bank, 170 U. S. 200.)

When and under what circumstances may it classify? This question has been answered time and time again by the United States Supreme Court, and it will not be out of place to give some of the general rules prescribed for determining when such classification is permitted, and when not permitted.

In *Barbier vs. Connolly*, 113 U. S. 27, it was said:

"Class legislation discriminating against some and favoring others is prohibited, but legislation which in carrying out a public purpose is limited in its application, if *within the sphere of its operation* it affects all persons similarly situated, it not within the amendment."

In *Railroad Co. vs. Mackey*, 127 U. S. 205, 32 L. Ed. 107, Mr. Justice Field again states the rule as follows:

"And when the legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions."

In *Magoun vs. Bank*, *supra*, Mr. Justice McKenna, speaking of the 14th Amendment, thus stated the rule:—

"It does not prohibit legislation which is limited, either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privileges conferred and the liabilities imposed."

These several quotations serve to illustrate the general principles to be applied in passing upon the constitutionality of the act under consideration. Does this act come within these general rules? It most certainly does. The "sphere of operation" of this act is railroads, and all railroads are brought within this "sphere of operation"; it affects all persons similarly situated—that is, all persons engaged in the railroad business. No employe of one railroad is given a right of action which an employe of another railroad is not given, if injured under the same circumstances. It

applies to and affects all alike. The persons "brought under the influence" of this act are railroads and railroad employes, and all are treated alike under the same conditions. The persons "subjected to such legislation" are railroads, and all railroads are "treated alike under like circumstances and conditions, both in the privileges conferred and the liabilities imposed."

It is contended, though, that while these rules are correct as applied to the cases, in which they are set forth, and are correct as far as they go, they do not go far enough. It is claimed the correct rule is set forth in *Railroad vs. Ellis*, 165 U. S. 150. In that case the legislature of Texas passed an act imposing upon railway corporations an attorney's fee not to exceed \$10.00 for failing to pay certain claims within a specified time, to be taxed as part of the costs in actions brought thereon. The penalty was not imposed upon *all* railroads, but only upon *corporate* railroads; neither was it imposed upon *all* corporations, but only upon *railroad* corporations. It was not a regulation designed for the protection of laborers and mechanics in the employ of the company, but was extended to every person having a claim not over \$50.00 for work or labor performed, for damages, for over-charges in freight, or for stock killed or injured. This Court held such a statute did not come within the scope of police regulations, was not intended for a particular class of individuals supposed to need protection, but for the punishment of railroad corporations, who failed to promptly pay their debts. In order that the reasoning of the Court in the *Ellis* case might not be misunderstood, or the decision misconstrued, Mr. Justice Brewer made use of the following:

"That such corporations (railroads) may be classified for some purposes is unquestioned. The business in which they are engaged is of a peculiarly dangerous nature, and the legislature in the exercise of its *police powers*, may justly require many things to be done by them in order to secure *life and property*. * * * And any classification for the imposition of such duties, duties

arising out of the peculiar business in which they are engaged, is a just classification, and one not within the prohibition of the 14th Amendment."

* * * * *

"But a mere statute to compel the payment of indebtedness does not come within the scope of the police regulations."

The Ellis case, the main authority upon which counsel for Appellant rely, thus recognized the right to classify railroads under statutes designed for the protection of life or property, whether it be the life or property of its employes or the public generally. It holds that a state, in the exercise of its police powers, has the right to pass such statutes and make such classifications, and that such statutes and such classifications do not come within the prohibition of the 14th Amendment. There is no real difference between the rule in the Ellis case and in the other cases cited, in so far as the persons within the class are concerned. It does not change the rule that the classification must apply to all brought within the sphere of its influence; it simply adds to that rule and says the classification must be "based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection," and says at the same time that such a statute as the one under consideration, having for its object the protection of the life, limb and property of railroad employes, is based upon such a reasonable ground, and is not a mere arbitrary selection.

3. In the enactment of statutes designed for the protection of the life and limb of laborers and mechanics, the legislature of each state has the inherent right to view the situation, ascertain what employes need additional protection and what employes do not, and when it has acted, the presumption is, it acted in good faith, and for the best interests of the people generally. It is only when the legislature has acted in an arbitrary and unreasonable manner that the courts will invalidate the action thus taken.

Employment in and about a railroad in any capacity is a hazardous employment, recognized by the legislature of Indiana in the passage of this statute as such. Some positions may be more hazardous and some less hazardous than others, but there are dangers to which all are exposed not common to other non-railway employments. The Defendant in Error was a member of a construction crew, employed by the railroad company to do work at any point on the road to which he might be sent by his superiors. His work was to construct and repair bridges, trestles, water tanks, coal chutes, and other structures necessary and proper for the company to have in carrying on its business. The evidence in this case shows that the work of the crew was not limited to one point or even to one section, but extended over the entire system. It is a matter of common knowledge and observation that railroad work of this character has a very wide range of operation. One day a member of the crew may be working with his regular crew, and tomorrow he may be sent to join some other crew. Today he may be working under one foreman and tomorrow another. Today his fellow workman may be a fellow servant, and tomorrow his superior or vice principal. Today he may be at work at one place on the system, tomorrow at another, and the next day still another. Today he may be engaged at work where he has to keep his eyes and ears open for approaching trains, and tomorrow this may not be necessary. Today he may have one set of appliances and tools with which to work, and tomorrow an altogether different set. Today he may be on a work train, or moving loaded trucks, and the next day he may not be. The constant variation of his labors—the constant change in the method, manner, plans, place and workmen—with which he has to deal—in other words, the universality of his work, if we may use the term, places him in a class by himself, and exposes him to dangers not common to the ordinary construction laborer.

Working on the railroad tracks, as the Court of Appeals

says he was, and as the record shows, the Defendant in Error was exposed to unusual hazards. At one moment he was crossing the tracks, at another he was standing on the tracks, at all times he was within a few feet of the tracks. Unless he kept his eyes and ears open and was constantly on the alert, there was danger of his being run over. Even with the utmost precaution on his part, coal from passing engines and cars might be precipitated upon him; a tool might be left by the foreman or some other member of the crew upon the track, which a passing train might drive against him; a projecting timber or tool from a passing train might strike him. The timbers used by such laborers are always heavy. To all these, and many other hazards, not common to ordinary labor in other lines, he was constantly exposed. The fact that he was injured in none of these ways did not lessen one whit the hazardous character of his employment, or take him out of the class in which he was placed by legislative enactment.

4. Not only was the Defendant in Error exposed to the hazards outlined above, but he was engaged at work connected with and essential to the operation of the railroad. There are many employes engaged in such work who are not employed on engines or cars. There are many things connected with and essential to the operation of a railroad besides engines and cars. If a body of men should associate themselves together and form a company to operate a railroad—should launch their company, notify the public they are prepared to transport freight and passengers, and it should develop they were attempting to carry on the business with a lot of engines and cars, with nothing more, we would be disposed to look upon them as fit subjects for the insane asylum. A railroad cannot be operated without engines and cars, but this is not all that is essential. It must have a track and right of way upon which to place same; it must have places to load and unload freight and passengers; it must have bridges and trestles upon which to cross rivers and swamps; tunnels by

which to go through mountains; places from which to obtain fuel and water, and so on. All these things are necessary to the operation of the road. This necessity has been recognized time and time again. If a railroad company desires the choicest portion of one's land upon which to erect its depots, or its water tanks, or its coal chutes, or its tracks, or its switches, or anything else directly connected with its business, it can compel one to sell that land however much he may desire to keep it. The only thing the officers of the railroad company need say is—this land is necessary for the operation of the railroad. If these things are necessary to the operation of the road when it comes to taking "other people's money," they are no less necessary when it comes to other people taking their money. One engaged in building or repairing these necessary facilities is engaged in work necessary to, and inseparably connected with, the operation of a railroad.

5. Instead of having the right to make classifications based upon the character of employments and the general hazards to which the employment exposes the employe, opposing counsel would confine legislative power and constitutional sanction to comparative danger producing the immediate injury. Not even a comparison of dangers to which the employe might be exposed generally, other than those producing the immediate injury—but to a comparison of the danger produced by the immediate cause of injury, in the railroad business, and the chance of being exposed to the same injury in other employments. Such a rule would abolish classification altogether. If an employe of a railroad company, engaged in work essential to the operation of the road, and exposed to the hazards of that business, is injured, he has his cause of action under the statute. It is no defense to his cause of action for the railroad company to say: This man was in my employ, doing work upon and about the railroad tracks, exposed at all times to the hazards peculiar to his business, but it happens that the thing which injured him was the breaking of a defective

chain negligently furnished by the foreman, and such a chain might have been furnished and used in the same manner, and produced the same injury in the same way, if the same persons had been doing the same kind of work for some non-railway employer. If such be the test, then only in very rare instances would such remedial statutes be available to the injured employe, because it is only in rare instances that a railroad employe is injured, but what the same circumstances might have been brought together so as to produce the same injury in some non-railway employment.

The true test is, not the comparative danger, but was the employe at the time of injury in the class prescribed by the legislature, did the classification embrace all within the same class, and is the classification based upon a reasonable ground, and not a mere arbitrary selection? If these three things concur, then the Court will uphold the validity of the statute as applied to him, and permit a recovery, nor will it make a comparison of dangers, or consider the facts of the particular injury. That this is the correct rule is established by all the decisions of this Court, and the inferior Federal courts, and by nearly all the State courts of last resort which have considered the question.

The case of *Chicago R. I. P. R. Co. vs. Stahley*, 62 Fed. Rep. 363, involves the Kansas fellow servant act. The plaintiff was employed by the railroad company and was, at the time he was injured, working in the round-house situated near the tracks. He was engaged in putting in order for use a new engine not then in running shape—not only a dead engine, but one that had never been in service. While lifting a driving rod, weighing from 500 to 800 pounds, for the purpose of placing it upon and attaching it to the engine, two of the men let go, which resulted in injury to the plaintiff. Under the Kansas statute railroads were made liable in damages for injuries resulting to an employe in consequence of any negligence of its agents, or by any mismanagement of its

engineer or other employes. The court held, Mr. Associate Justice Brewer writing the opinion, that, while the employe was not injured in the actual operation of trains, the employe injuring and the employe injured were engaged in work connected with the *operation of the railroad*, and that the railroad company was liable under the statute. The constitutionality of the statute was not in question in this case, but this case was cited and approved in the case of *Chicago, Kansas, Etc. R. Co. vs. Pontius*, 157 U. S., 209, where the constitutionality of the same statute was involved.

In the *Pontius* case, just mentioned, the injured employe was a bridge carpenter, and worked in that capacity at various points on the railroad. A bridge was being constructed, the false work was being taken down and loaded into cars on the bridge to be transported to some other point on the road. The timbers were muddy and slippery. In raising one of them to load on the car, the rope holding it slipped, the timber fell and injured the plaintiff. The Supreme Court of Kansas held the employe was engaged in work connected with the operation of the railroad, and that the defendant was liable. The case was taken to the United States Supreme Court on a writ of error, upon the ground that the statute, as construed by the Supreme Court of Kansas, was repugnant to the 14th Amendment. Mr. Justice Fuller delivered the opinion of the Court, cited the *Stahley* case, *supra*, and affirmed the judgment of the Supreme Court of Kansas.

The State of Missouri has a fellow servant statute as follows:—

"That every railroad corporation owning or operating a railroad in this state, shall be liable for all damages sustained by any agent or servant *thereof while engaged in the work of operating such railroad*, by reason of the negligence of any other agent or servant thereof; provided, that it may be shown that the person injured was guilty of negligence contributing as a proximate cause to produce the injury."

The construction of this statute was before the Supreme

Court of Missouri in the case of Callahan vs. St. Louis M. B. T. Ry. Co. 170 Mo. 473; 71 S. W. R. 208. The facts in the case, as stated in the opinion of the court, were as follows:

"The defendant's railroad crosses Ferry street in the city of St. Louis, by an overhead bridge, which is some 50 feet above the level of the street. The plaintiff was a member of a section gang that was engaged in repairing the railroad by taking out old ties and putting in new ones. When the old ties were taken out, they were thrown down onto Ferry street, instead of being carried away. The plaintiff was stationed on Ferry street to warn passersby of the danger, and to remove the ties that were thus thrown upon the street. * * * * While so engaged in such work, a small child appeared on Ferry street, and was in a place of peril. The plaintiff went to her, and, while engaged in removing her, the gang on the bridge threw a tie down on the street, which struck the plaintiff on the leg, and injured it so that it had to be amputated."

The defendant took identically the same position taken by the appellant in this case. That the statute only applied to such employes of the railroad as are subjected, by the character of the work they are employed to do, to the hazards incident to the running of a train. And further, that if the law was construed to cover railroad employes who are not subjected to such hazards, but are only subject to such risks as would be incurred by the employes of any other person or corporation when engaged in similar work, then it violates the 14th Amendment. In disposing of the question presented, the court cited a number of decisions from Kansas, Georgia, Wisconsin and Indiana. It also commented upon the cases from Iowa and Minnesota, and thus summarized its conclusions:—

"It thus appears that everywhere, except in Iowa and Minnesota, the adjudications agree that it is not essential that the injury should have been inflicted by reason of the negligence of a fellow servant while actually engaged in running a car, but that the injured employe may recover if injured by the negligence of a fellow ser-

vant while they are engaged in doing any work for the railroad which was directly necessary for the operation of the railroad. * * * Under the language of our statute it is necessary for the injured employe to show that he was injured 'while engaged in the work of operating such railroad.' Construed either by its own terms, or in the light of the cases cited from other jurisdictions, it results in holding that the right to recover is not limited to cases where the injury is inflicted by reason of the negligence of a fellow servant while actually moving a train or engine, but that the law embraces all cases where the injury is inflicted upon an employe while engaged in the work of operating a railroad, by reason of the negligence of any fellow servant, who is likewise engaged in the work of operating a railroad, and the term, 'operating such railroad,' includes all work that is directly necessary for running trains over a track, and that it includes section hands who are engaged in working upon, repairing, or putting in shape the track, road-bed, bridges, etc., over which the trains must run.

"2. The next question is whether the plaintiff falls within the class embraced in the act. Section gangs are included. The plaintiff was a member of the section gang that was doing the work. The work being done was directly necessary for the operation of the road."

The case was taken to the Supreme Court of the United States on a writ of error, and the court disposed of the whole case by this memorandum opinion:—

"Judgment affirmed, with costs, on the authority of *Tullis vs. Lake Erie & W. R. Co.*, 175 U. S., 348-351; 44 L. Ed., 192-194, and cases cited."

St. L. & C. R. Co. vs. Callahan, 194, U. S., 628.

Here, then, are three cases, one cited and approved, and two affirmed by this Court, in none of which the employe was injured in train service or in train operation. In all of them the same injuries might have been suffered in the same manner in other than railroad employment. If, instead of being employed by a railroad company, *Stahley* had been employed by an engine manufacturer, engaged in the construction and manufacture of engines, or had

been engaged at a saw-mill preparing the engine for operation by putting on a driving rod, he might have received the same injury in the same manner, yet he could not have recovered. If, instead of being an employe of the railroad company, Pontius had been employed by a bridge contractor, or at a saw mill, or any other place where muddy and slippery timbers might be lifted with a rope, the rope might slip and inflict the same injury in the same manner. If, instead of being employed by a railroad company, Callahan had been employed by a municipal corporation in removing timbers from a bridge, he might have received the same injuries in the same manner. Yet in all of these cases the statute was applied and this Court has said the application of the statute thus made did not render the statute in conflict with the 14th Amendment.

One more illustration will more fully demonstrate the fallacy of this argument. The boiler of an engine on a railroad may explode from the negligence of a fellow servant and injure an employe; it is conceded that such employe would have a right of action and that the statute as applied to him would be constitutional. The boiler of a cheap traction engine used in threshing a farmer's grain, or an engine used at the average portable saw-mill is much more likely to explode, and from that standpoint is much more dangerous than the engine upon a railroad, yet to such cases the statute does not apply.

6. At the time this brief is in preparation we have not been favored with a copy of the brief for Plaintiff in Error and cannot, therefore, anticipate all the arguments that may be presented. If it should be argued that the defendant was engaged in no more hazardous work than he would have been if in the employ of some individual or corporation other than a railroad, we have already answered the argument, but the Court of Appeals of Kentucky has given a more forcible answer than any we could present, and one that is conclusive as a finding of fact, when it

said this work was "perhaps no less perilous than the work of an operative on one of its trains." If it is argued that Defendant in Error was not engaged at work essential to the operation of the railroad, that argument, too, we have attempted to meet, but the Court of Appeals of Kentucky has forcibly and conclusively met it, when it said in its opinion, and found as a fact, that the Defendant in Error was engaged at work on the railroad tracks building a coal chute or tipple, and that "the construction of a coal tipple is therefore essential to the operation of a railroad." Not only are these answers to such arguments worthy of consideration, and based upon the evidence, but they are binding and conclusive and must be taken as true. These conclusions of the state court present findings of fact which are not subject to review on writ of error to a state court.

Dower vs. Richards, 151 U. S., 658.

Hedrich vs. Santa Fe &c. R. R. Co., 167 U. S., 673.

Keokuk &c. B. Co. vs. Illinois, 175 U. S., 626.

Gardiner vs. Bonestell, 180 U. S., 362.

7. This brings us in the discussion to the case of Indianapolis &c. Co. vs. Kinney, 85 N. E., 954, decided by the Supreme Court of Indiana October 27, 1908. We have heretofore shown that there was no plea and no proof of the construction which had been or would be placed upon this statute by the Indiana Courts, and that no decision of the courts of that state construing the statute, would be judicially noticed by the Kentucky Court of Appeals or by this Court. We have also shown that the Kinney case was decided over five months after the writ of error in this case was granted. It comes now in the nature of newly discovered evidence, and the plaintiff asks this Court to consider it, without pleading, and without proof. The Court of Appeals of Kentucky could not have considered it, even if the construction by the Indiana Courts had been pleaded, and it cannot now be made or become a part of the record. The decision of the Kentucky Court

of Appeals must stand or fall in this Court upon the record as it stood at the time of that decision, and not upon the record as it might have been, or upon any decision of some state court subsequently rendered.

The decision of the Indiana court in the Kinney case has no binding force whatever upon this Court. It is not a question as to whether the construction and application of the statute in the Kinney case was right or wrong, constitutional or not constitutional; but whether or not the construction and application of the statute by the Kentucky Court of Appeals in this case, renders the statute in conflict with the equal protection provision of the 14th Amendment. If the statute in question, passed by the legislature of the State of Indiana, as construed and applied by the Kentucky Court of Appeals to the facts of this case, does not, in and of itself, deprive the Plaintiff in Error of the equal protection of the law, it cannot complain that some other court in some other case has construed the statute in a different manner. This is true even though this Court might conclude the construction of the statute by the Kentucky court was erroneous. Such erroneous construction would amount only to judicial error. Judicial error in administering a constitutional state law, however gross that error may be, is not reviewable by the Supreme Court, upon a writ of error to the state courts, so long as the law administered is constitutional.

It will be observed that even in the Kinney case the Supreme Court of Indiana reiterated its former holding that the statute itself was constitutional. It says:—

“Appellant in maintaining the negative contends: First, that the statute referred to violates the Fourteenth Amendment to the Federal Constitution, in that it denies to the appellant the equal protection of the law in its capacity as an employer. The question received the consideration of the court in *Railway Co. vs. Montgomery* * * * and has been before this court in a number of cases since. (Citing cases.) But in no subsequent case

has any reason been suggested to impair our confidence in the rule laid down in the *Montgomery* case on this point; and being satisfied therewith we deem it unprofitable to repeat the reasons for such holding."

Immediately preceding the paragraph just quoted appears this language:—

"The complaint and construction each presents the same question, and assumes that the Employers' Liability Act applied to the facts stated. Is appellee correct in this assumption?"

The court then enters into a discussion of the case and holds in effect that while the act is constitutional, it does not apply to the facts stated in the *Kinney* case. In other words, the *Kinney* case turns not upon the constitutionality of the statute, but upon its construction and application.

8. The construction and application of the statute in this case does not present a Federal question and is one over which this Court in this case has no jurisdiction. This is distinctly and definitely settled in the case of *Martin vs. Pittsburg &c. R. Co.*, 203, U. S., 284. There *Martin* was injured in Pennsylvania and brought suit to recover damages in Ohio. The railroad company pleaded in defense a law of Pennsylvania, which it alleged was applicable and relieved it from responsibility. Notice the striking similarity in the plea there and in the case at bar as found in the statement of the case by Mr. Justice White—"In reply the plaintiff denied the existence and applicability of the statute, but alleged that if it did exist and was applicable it was void, among other reasons, because in conflict with the 14th Amendment." There are but two differences in the pleas—in the *Martin* case the existence of the statute itself was denied and therefore had to be proved, while in this case its existence is admitted. In the *Martin* case the plea of the statute was made by the railroad company, and its application and constitutionality were denied by the injured person; while in this case the statute was pleaded by the injured person, and its application and constitutionality were denied by the

railroad company. In all other respects the two pleas are identical. Upon the construction and application of the Pennsylvania statute by the Ohio courts, this Court said:—

“As the application of the statute, if valid, presents no Federal question, we are unconcerned with that matter. * * * *”

Not only does the Martin case just cited apply with peculiar emphasis on the point of Federal question, but it is a recent and apt decision upon the constitutionality of the statute in question, because it involved the constitutionality of a statute of Pennsylvania lessening, rather than increasing, the common law liability of railroads with reference to certain personal injuries. The statute provided, the italics being our own:—

“That when *any* person shall sustain personal injury or loss of life while lawfully engaged or employed on or about the *roads, works, depots* and *premises* of a railroad company, or in or about any train or car therein or thereon, of which company such person is not an employe, the right of action and recovery in all such cases against the company shall be only such as would exist if such person were an employe, provided that this section shall not apply to passengers.”

This Court upheld the constitutionality of the statute quoted. If this statute, reducing as it does the common law liability of the railroads in the cases named, and passed for the protection of railroads in such cases, is constitutional, we confess our inability to see upon what ground the statute in question, increasing the common law liability of railroads, and passed for the protection of the hundreds of thousands of railway employes, can be held to violate the Constitution. In passing upon the equal protection question the court among other things, said:—

“The classification made by the statute does not alone embrace railway mail clerks, but places in a class by themselves such clerks and *others* whose employment in and about a railroad subjects them to greater peril than passengers in the strictest sense. This general difference renders it impossible in reason to say, within the

meaning of the 14th Amendment, that the legislature of Pennsylvania, in classifying passengers in the strict sense in one class and those who are subject to greater risks, including railway mail clerks in another, acted so arbitrarily as to violate the equal protection clause of the 14th Amendment."

We may be pardoned in passing for expressing the opinion that the decision of the Supreme Court of Indiana in the Kinney case is not a well considered opinion. It contains a discussion and an expression of opinion upon several questions not necessarily involved in the decision of the actual question presented, which is therefore the mere dictum of the judge who delivered it. Involving, as it does, in the discussion, the equal protection clause of the Federal Constitution, not a single Federal authority is cited, commented upon or distinguished, except *Railroad Co. vs. Artery*, 137 U. S., 507, which does not discuss the constitutional question, and only follows as binding the decisions of the Supreme Court of Iowa, construing the Iowa statutes. The decisions and the approval by this Court of the *Stahley*, *Pontius*, *Tulis* and *Callahan* cases, *supra*, are not mentioned or referred to. Certainly, if those opinions had been analyzed, the court could not have expressed the dictum, that such statutes should be construed to apply only to those employes whose injuries are caused by the use and operation of railroad engines and trains. Neither is the decision of the Kentucky Court of Appeals herein, construing the same statute mentioned or commented on, although rendered almost a year before that case was decided. The judge confines his citation of authority to the decisions of the two states of Iowa and Minnesota, and has ignored altogether the numerous decisions rendered by the courts of other states upon the same question. All but one of the cases cited are from Iowa, and the Iowa statute is materially different from the statute here, which fact the court fails to take notice of. We thoroughly agree with this part of the decision in the Kinney case: —

"So far as our researches have gone, no court has

attempted to set up an arbitrary line of demarcation by which the application of the statute may be determined. It is apparent that no reliable test can be established by any general rule. Each case must be decided on its own facts. * * * *

Upon its own facts the Indiana Supreme Court held the statute did not apply to the Kinney case; upon its own facts the Court of Appeals has held the statute did apply in this case. This Court is in no sense bound by the construction of the statute in the Kinney case, because that case is not before this Court either by pleading, proof, nor for review, while this Court is bound by the construction of this statute in this case, and has no jurisdiction to set aside, or require the Court of Appeals of Kentucky to set aside its construction and application thereof.

9. In cases decided both before and after the Kinney case, the Supreme Court of Indiana and the Court of Appeals of Indiana, the latter court being the court of last resort in the particular cases cited, have applied the statute to cases similar in principle to this case. We cite the cases, not as in any sense binding, but for the purpose only of showing how the courts of Indiana construed and applied the statute at the time the Kentucky Court of Appeals was called upon to decide this case, and since.

In *Street Railway vs. Kane*, 80 N. E., 841, decided by the Supreme Court of Indiana, that court applied the statute in a case wherein the facts stated in the opinion were as follows:—

“May 11, 1899, the Central Avenue Bridge over Fall creek, in the city of Indianapolis, broke and fell while the gravel train of appellant was passing over it. Trackmen were ordered to the bridge to make repairs, among them the appellee, by defendant's roadmaster, who was thereto duly authorized by the defendant. Arriving at the bridge late in the afternoon, it was found that the east of the two tracks over the bridge was suspended from pier to pier, holding with it that part of the bridge that was fastened to the ties. Footmen were passing over the suspended structure, which being manifestly dangerous, it was decided to put a prop, or pillar, under each rail,

midway between the piers to relieve *temporarily the danger to passing footmen*. Two heavy timbers were brought, a footing prepared, and one piece raised to an upright position and forced into place under the west rail, under the direct supervision of the defendant's road-master. The latter, when the first timber was placed, ordered the plaintiff to clear a place for another like prop under the east rail. While engaged in obeying the order, the timber that had just been set fell, and inflicted upon the appellee the injuries for which he sues."

In *Baltimore &c. R. Co. vs. Walker*, 84 N. E., 730, the Appellate Court of Indiana held the statute applied, where a railroad section hand was struck by slivers thrown from a defective chisel used by other employes in cutting bolts holding a frog in place.

In *Cleveland &c. R. Co. vs. Foland* 88, N. E., 787, June 11, 1909, the Appellate Court of Indiana applied the statute in a case where a bridge carpenter was injured by a fall of an insecurely fastened pile, while engaged, under his foreman's orders, in assisting in placing other piles for the action of the pile driver.

10. There are numerous state statutes and decisions of state courts applying similar statutes to similar cases, and upholding their constitutionality as thus applied, which we cite only for the purpose of placing before the court the result in part of our researches. We may not agree with all that is said in some of them, but they show how the state courts look upon the question.

The Georgia Employer's Liability Statute applies to railroads generally, and is not confined to injuries received in railroad operation or in the operation of trains. The constitutionality of the statute was not raised in *Railroad Co. vs. Ivey*, 73 Go. 504, but in that case the Supreme Court of Georgia held, that the statute applied in cases where a bridge carpenter was injured through the negligence of another bridge carpenter, in work wholly disconnected with the operation of trains. In the subsequent case of *Railroad Co. vs. Miller*, 90 Go. 571, an employe was injured through the negligence of an employe, both of whom were en-

gaged in removing an eccentric from an engine. The question was again raised that the Georgia statute applied to injuries received in the operation of trains, and it was also insisted that the statute, if otherwise construed, was in violation of the 14th Amendment. The court held that, under the repeated adjudications of that court, the statute applied, cited and approved the Ivey case, and held that it was not confined in its operation to train operation or train service, and held, further, that the statute thus construed did not violate the 14th Amendment.

In a still later case, *Georgia, Etc., R. Co. vs. Hicks*, 22 S. E., 613, the employe was injured while engaged in putting a line of gas pipe in the ceiling of the company's car shop; in the progress of the work another employe let go one end of a piece of gas pipe, which caused the plaintiff, who was standing on a ladder, to lose his balance and fall. The first head note as found in the decision is as follows: —

"The plaintiff, an employe of a railroad company, having brought suit against his employer for damages sustained by reason of injuries inflicted in consequence of the negligence of a fellow servant in and about a common employment, if himself free from fault, is entitled to recover, notwithstanding their engagement in business not immediately connected with running and operating the company's trains."

The Supreme Court of Georgia said:—

"The principle declared in the first head note (the one above quoted) has been so frequently and so strongly stated by this court heretofore, that it is unnecessary to attempt a further elaboration of the reasons which justify its recognition. It might be well for the profession to recognize that with reference to some matters, at least, they are so well established as, upon the doctrine of *stare discisis*, to be beyond further controversy."

In 1891 the legislature of Texas passed an act relating only to railroad corporations, modifying the common law fellow servant rule to the extent that all persons intrusted by the railroad

company with the authority of superintendence, control or command, or with the authority to direct any other employe in the performance of his duties, were made vice-principals and not fellow servants. This statute was in effect the same as the second subdivision of the Indiana statute. In the case of *Campbell vs. Cook*, 86 Texas, 630, the Supreme Court of Texas held the statute did not violate the 14th Amendment, and said:—

“This law applies to each and every railroad doing business in the state, and in no other respect does it discriminate against any particular railroad company— ‘When legislation applies to a particular body or association, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions.’ ”

Subsequently this statute was amended (*Sayles Ann. Civ. St. Texas*, 1897) so that section 4560f and 4560g now read as follows:—

“4560f. Every person, receiver or corporation operating a railroad or street railway, the line of which shall be situated in whole or in part in this state, shall be liable for all damages sustained by any servant or employe thereof while engaged in the work of operating the cars, locomotives or trains of such person, receiver or corporation, by reason of the negligence of any other servant or employe of such person, receiver or corporation; and the fact that such servants or employes were fellow servants with each other shall not impair nor destroy such liability.

“Art. 4560g. All persons engaged in the service of any person, receiver or corporation, controlling or operating a railroad or street railway, the lines of which shall be situated in whole or in part in this state, who are intrusted by such person, receiver or corporation with the authority of superintendence, control or command of other servants or employes of such person, receiver or corporation, or with the authority to direct any other employe in the performance of any duty of such employe, are vice-principals of such person, receiver or corporation, and are not fellow servants with their co-employees.”

The effect of section 4560f was to abrogate altogether the common law rule of fellow servants, as far as the persons engaged in the work of operating cars was concerned. Section 4560g, however, only modified the rule as to other employees, and made vice-principals those who are intrusted with authority of superintendence or direction of employees. In other words, section 4560f of the later act was identical in effect with the old act, except that it was extended so as to include receivers of railroads and street railways, and in construing this section the courts of Texas followed the same rule and applied the same law that had been declared with reference to the previous statute. In quite a number of cases the Supreme Court of Texas has applied this section of the statute (4560f) to railroad employees not engaged in the operation of trains, or work connected with the operation of trains.

In the case of *Galveston, etc., R. Co. vs. Mohrman*, 93 S. W. R., 1090, the injured employee was sent to prepare a chute to a stock pen, and as he started to obey the orders, a member of a train crew in placing a running board from a standing car to the chute, negligently permitted it to strike the plaintiff and injured him. It was held that while at common law the negligent servant and the injured employee would have been fellow servants, yet under section 4560g of the Texas statute, they were not, and a recovery was permitted.

Sherman vs. Texas, etc., R. Co., 91 S. W. R., 561, is a case decided by the Supreme Court of Texas. Here a helper in a machine shop, who was required to obey the foreman of the shop, was directed by the foreman to aid an operator of a turning lathe in placing a piece of iron on the machine. The operator whom he was ordered to assist, directed the helper what to do, and instructed him to lift the piece of iron. It was too heavy for the boy, seventeen years of age, to lift, and in trying to conform to the directions given him, he received internal injuries for which he sued. The court held, that although the boy, and the operator

whom he was assisting, were fellow servants at common law, they were not so under section 4560g of the Texas statute, and a recovery was upheld.

The case of Texas, etc., R. Co. vs. Carlin, 111 Federal R. 777, was brought in the Federal court. In that case a gang of workmen under a foreman, were engaged in repairing a bridge. One of the workmen (Carver) after having used a maul in his work, placed it on the bridge. It was the duty of the foreman to see that the bridge was clear. A train passed, evidently hit the maul, knocked it against Carlin, a member of the crew, severely injuring him. There was no claim made that anyone in charge of, or connected with, the train, was guilty of negligence in any manner whatever. The only claim was that the foreman was negligent in not having the maul removed before the train passed. The railroad claimed that whether the injury was caused by the negligence of Carver or of the foreman, neither were vice-principals, but were fellow servants of Carlin, and therefore the company was not liable. The United States Circuit Court of Appeals for the Fifth Circuit held, that while at common law the railroad company's position would be correct, under the Texas statute a different rule prevailed, and that the railroad company was liable. This case was taken to the United States Supreme Court, and was affirmed. (Texas R. Co. vs. Carlin, 189 U. S., 354.

The Texas statute is, in many respects, the same as the Indiana statute, and is identical in effect as far as that portion thereof defining who shall be considered vice-principals is concerned. If the Texas statute is valid, and was properly and legally applied in the cases above mentioned, then the Indiana statute is valid. If the statute was not valid then these courts in these cases would have so held. In no case has the Texas statute been held unconstitutional by the Supreme Court of Texas, and in many cases it has been held constitutional. If it be

true, that no case has been presented to that court in which the constitutional question has been raised except cases of injury by operation of trains, the fact that the question was not raised or discussed in the cases cited, shows that, in its application to railroads and railroad employes generally, the constitutionality of the statute is regarded as settled in Texas. If it were not so regarded, the able members of the profession who practiced these cases for the railroads would have raised the point.

In 1897 the legislature of North Carolina adopted an employes' liability statute relating to railroads, the part applicable being as follows:—

“Section 1. That any servant or employe of a railroad company, operating in this state, who shall suffer injury to his person, or the personal representative of any such employe who shall have suffered death, in the course of his services or employment with said company, by the negligence, carelessness or incompetency of any other servant, employe or agent of the company, or by any defect in the machinery, ways or appliances of the company, shall be entitled to maintain an action against such company.”

This statute has been repeatedly upheld and applied by the Supreme Court of North Carolina. In *Hancock vs. Norfolk R. Co.*, 32 S. E. 679, that court said, speaking of the common law fellow servant rule in connection with the statute, and in passing on the constitutionality of the statute:—

“Its extent has been differently outlined in different states by judicial construction, and in several states it has been restricted by legislative enactment so as not to extend to employes of railroad companies, as has been done in this state. As the original ground of the decision was that a servant knew the character for care of his fellow servant, and entered service with a view of that risk, the courts themselves might logically have long since modified the ruling not to extend to employment like that of railroads, embracing many thousands of employes, and exposing its servants to peculiar risks. The fellow servant act now in question applies to a well

defined class, and operates equally as to all within that class."

Rutherford vs. Southern R. Co., 35 S. E., 136 (N. C.) was a case where a crew was engaged in loading rails upon a car. One "having the right to direct" negligently failed to countermand an order given an employe to throw on a rail, by reason of which a rail fell and injured such employe. A recovery was permitted.

In Mott vs. Southern Ry. Co. 42 S. E., 601, (N. C.) the plaintiff was injured while in the employment of the defendant company. He was ordered by one who had a right to command him, to aid a foreman in taking a tire off an engine, which tire weighed 800 or 1,000 pounds, and had to be heated red-hot to obtain the expansion necessary to secure its removal. While so engaged, the tire slipped, through the negligence of the defendant and its servants, fell upon an iron bar which plaintiff was using, crushing and injuring him. The court held that the statute embraced "any servant or employe or any railway company * * * in the course of his employment with said company," and that the plaintiff was entitled to maintain his action.

In Sigman vs. Southern R. Co., 47 S. E., 420, the Supreme Court of North Carolina said:—

"The plaintiff was injured by the negligence of a fellow servant while working upon and repairing a bridge of the defendant railroad. It is settled that the fellow servant law applies to railroad employes injured in the course of their employment with such corporation, whether they are running trains or rendering any other service."

And lastly, in Nicholson vs. Transylvania R. Co., 51 S. E., (N. C. 1905) 40, the same court said:—

"Knowing from the history of the strenuous discussion for and against the passage of the act, and from its language as well, that the intention of the legislature was that the doctrine of the non-liability of the master for injuries to an employe caused by the negligence of a fellow servant, should be abolished as to all employes in

railroad service, 'whether (as we have said in *Sigman vs. Railroad Co.*, *supra*) they are running trains or rendering any other service; we have no disposition to do otherwise than to affirm fully our ruling already made and cited above. But the act applies only to employees of a 'railroad operating'; not that such employees must be operating the trains, but they must be employees in some department of its work, of a railroad which is being operated. Such business is a distinct, well known business, with many risks peculiar to itself, and all the employees in such business, whether running trains, building or repairing bridges, laying tracks, working in the shops, or doing any other work in the service of an 'operating railroad,' are classified and exempted from the rule which requires employees to assume the risk which may be caused by the negligence of a fellow servant."

II. The constitutionality of the Ohio employers' liability statute was involved and upheld in *Pierce vs. Van Dusen*, 78 Fed., 693.

The constitutionality of the Kansas statute, applying to railroads only, was also upheld in the case of *Missouri Pacific R. vs. Mackey*, 127 U. S., 205. This was the first, and for a long while, the only case in the United State Supreme Court involving this question directly, and is referred to in all later decisions.

The Minnesota fellow servants' act applying only to railroads, excepted from its operation employees engaged in the construction of a new road, or any part of the road not open to public travel or use. It was held this exception did not render it repugnant to the 14th Amendment. *Minnesota Iron Co. vs. Kline*, 199 U. S., 593.

A statute of Missouri required railroads to erect and maintain fences on the side of the road where the same passed through inclosed or cultivated fields, or uninclosed lands. The statute was upheld as not being repugnant to the 14th Amendment. *Missouri Pacific Ry. Co. vs. Humes*, 115 U. S., 512.

To the same effect is the case of *Minneapolis & St. L. Ry.*

Co. vs. Beckwith, 129 U. S., 26, wherein is involved the Iowa fencing statute, applying only to railroads.

A statute of Minnesota required all owners of grain warehouses located on the right of way, depot grounds, or other property of railroads to pay a license fee, which did not apply to other grain warehouses. It was held the statute was not unconstitutional. *W. W. Cargill Co. vs. Minnesota ex rel Railroad & Warehouse Commission*, 180 U. S., 452.

See also :—

Minneapolis, etc., Ry. Co. vs. Herrick, 127 U. S., 210.

Same vs. Emmons, 149 U. S., 364.

Kane vs. Erie Ry. Co., 133 Fed., 681.

We cannot know at this time what cases from this Court may be cited in the brief of counsel for Plaintiff in Error. All of the cases from the United States Supreme Court, cited by them below, in which statutes were condemned as repugnant to the 14th Amendment, deal with statutes essentially different from the statute in question. The classification made in those statutes were arbitrary and were not based upon a difference which justified the classification, as a mere glance at them will show.

We have heretofore commented on the Ellis case.

The statute condemned in the *Kansas City Stock Yards Co.* case, applied only to that company and not to other corporations or companies of similar character in Kansas.

The Illinois Trust Statute condemned in the *Union Sewer Pipe Co.* case, was condemned because there was no reasonable ground upon which it should apply to others and not to the producer or raiser of products or live stock.

The statute in the *Mississippi Cotton Oil* case, was condemned by the Supreme Court of Mississippi for the same reason that the statute in question was condemned by the Supreme Court of Indiana in so far as it applied to "other corporations," because there is no reason for classifying all corporations and imposing

upon them burdens not imposed upon individuals or co-partnerships in the same business.

None of these cases have any proper application to the statute in this case, and they were completely distinguished and commented upon in many of the cases herein recited. Other cases cited below are commented upon and distinguished in Appellee's response to the petition for re-hearing (R. 164-171), and we do not deem it necessary to review them again here.

12. A brief reference to the Federal Employers' Liability Act will tend to further illuminate the constitutional question her involved.

Notwithstanding this Court, in the Employers' Liability cases (Howard vs. Illinois Central), 207 U. S. 463, held the Federal Act of 1906 invalid in its general application, yet in the case of El Paso &c. R. Co. vs. Gutierrez, 215 U. S. 87, it was held valid in so far as it relates to the District of Columbia and the Territories.

Now, we assume that Congress has no greater power to regulate the reciprocal duties and obligations of master and servant within the territories than the legislative bodies of the various states have within their own boundaries, so far as the limitations of the Federal Constitution are concerned. From the standpoint of the Federal Constitution, any valid act which Congress might pass on the subject, applying alone to territories, might likewise be passed by any state to apply within its borders. If, therefore, the Federal Employers' Liability Act of 1906 is valid when applied to the District of Columbia, and the Territories, the same act, if passed by the legislature of any state, would be likewise valid and not in conflict with the Federal Constitution.

As the Indiana statute has gone through the process of elimination by the decisions heretofore cited, so the act of 1906 has gone through the same process, and, with reference to the Dis-

trict of Columbia and Territories, the first section of that act may now be read as follows:—

“That every common carrier engaged in trade or commerce in the District of Columbia, or in any territory of the United States * * * shall be liable to any of its employes, or, in the case of his death, to his personal representatives for the benefit of his widow and children if any; if none, then for his parents; if none, then for his next of kin dependent upon him, for all damages which may result from the negligence of *any* of its officers, agents or employes, or by reason of *any* defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, road-bed, ways or works.”

In *El Paso vs. Gutierrez*, *supra*, this Court held that in so far as the part of the Act of 1906 just quoted is concerned, “the Congress proceeded within its constitutional power.”

If this act is a valid exercise of legislative power on the part of the Congress, and in its application to the territories, it is not possible to conceive upon what ground it can be held that the Indiana Act in question is not a valid exercise of legislative power on the part of the Indiana legislature, so far as the Federal Constitution is concerned.

III.

We do not consider it necessary to discuss the question, hinted at, but not distinctly raised in the assignment of error, that the statute as construed deprives the Plaintiff in Error of its property without due process of law. This question was never presented, or raised, directly or indirectly, in the state court, by pleading or even by suggestion in argument. Neither is it in any way passed upon by the decision of the Kentucky Court of Appeals. Our arguments upon the propositions involved apply to this question, and the authorities cited dispose likewise of this issue.

CONCLUSION.

If this Court has no jurisdiction in this case of the Full Faith and Credit question, then we submit that the motion to Dismiss and Affirm, with damages, heretofore entered, should be

sustained, because the other questions are settled by the cases cited. Upon the whole case, at any rate, an affirmance of the judgment of the Court of Appeals of Kentucky is asked.

Respectfully submitted, JAS. W. CLAY,
Counsel for Defendant in Error.

Of Counsel:

WILLIAM L. GORDON,
WILLIAM J. COX,
MAURICE K. GORDON,
J. F. CLAY.

